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IN THE

Supreme Court of the United States

HANDICOMP, INC.,
a Michigan corporation,

Petitioner,

v.

UNITED STATES GOLF ASSOCIATION,
a Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

This is a private antitrust case brought against the United States Golf Association, the governing body and standard setter for the sport of amateur golf in the United States. In 1981, USGA began a commercial business to sell its golf handicap computation service to regional golf associations throughout the United States. Through the improper use of its monopoly power as the sport's rulemaker, USGA has attained a monopoly in the separate market for golf handicap computation services by erecting high entry barriers and inflicting injury in ways analogous to those recently found to violate the antitrust laws in *United States v. Microsoft Corp.*, 1999 WL 1001148, 17 (D.D.C. 11/5/99).

1. Did the Third Circuit err in affirming the grant of summary judgment against Handicomp when it failed to consider, in conflict with the holdings of the Supreme Court, USGA's abuse of its monopoly power as the industry's governing body and standard setter in order to obtain competitive advantages for its own commercial handicap computation service?

2. Did the Third Circuit err in holding, in conflict with the Tenth Circuit Court of Appeals, that the only relevant barrier to entry into the industry is the difficulty associated with creating the product or service?

3. Did the Third Circuit err when it held, in conflict with decisions of the Supreme Court, that Handicomp had not demonstrated antitrust injury?

4. Did the Third Circuit err when it affirmed, contrary to controlling decisions of the Supreme Court, the district court's refusal to consider evidence predating the limitations period and by refusing to consider illegal acts committed by USGA *within the limitations period* because Handicomp did not ascribe particular damages to each such act?

STATEMENT PURSUANT TO RULE 29.6

There is no parent or publicly held company owning 10% or more of petitioner Handicomp, Inc.'s stock. Handicomp, Inc. is a privately owned Michigan corporation.

TABLE OF CONTENTS

	Page
Questions Presented For Review	i
Statement Pursuant To Rule 29.6	ii
Table Of Contents	iii
Table Of Cited Authorities	vii
Table of Appendices	x
Opinions And Orders Entered In The Case	1
Basis For Jurisdiction In The Supreme Court	1
The Statutes Involved In The Case	1
Jurisdictional Basis In The District Court	1
Statement Of The Case	1
Statement Of Facts	3
Facts Relevant To USGA's Illegal Monopoly Which Were Ignored By The Courts Below	3
A. USGA Has A 100% Monopoly As Golf's Rulemaker And Standard Setter.	3
B. Handicomp's History In Brief.	3

Contents

		Page
C.	USGA Enters The Handicap Service Business With GHIN And Acquires A Monopoly.	4
D.	Barriers To Entry Are High.	4
E.	The USGA Handicap System And The Regional Associations' Role In Issuing "USGA Handicaps".	5
F.	USGA's Purpose In Monopolizing The Handicap Service Industry.	6
G.	USGA's Abuse Of Power And The Manipulation Of The Rules Of Golf For GHIN's Competitive Advantage.	7
H.	USGA's Power To Create And Destroy Customers.	9
I.	USGA's Abuse Of Its Position As Golf's Governing Body To Unfairly Curry Favor With The Regional Associations.	9
J.	USGA's Agreement To Kickback GHIN Profits To The Associations.	11
K.	The McKinsey Study And USGA's Anticompetitive Conduct.	11

Contents

Page

L. The GHIN Feasibility Study And USGA's Early Intention To Quickly Acquire Market Power. 12

M. Evidence Of USGA's Monopoly Power. 13

Reasons For Granting The Writ 13

I. The Third Circuit Erred In Affirming The Grant Of Summary Judgment Against Handicomp When It Failed To Consider, In Conflict With The Holdings Of The Supreme Court, USGA's Abuse Of Its Monopoly Power As The Industry's Governing Body And Standard Setter In Order To Obtain Competitive Advantages For Its Own Commercial Handicap Computation Service. 13

II. The Third Circuit Erred In Holding, In Conflict With The Tenth Circuit Court Of Appeals, That The Only Relevant Barrier To Entry Into The Industry Is The Difficulty Associated With Creating The Product Or Service. 16

III. The Third Circuit Erred When It Held, In Conflict With Decisions Of The Supreme Court, That Handicomp Had Not Demonstrated Antitrust Injury. 21

Contents

Page

IV. The Third Circuit Erred When It Affirmed, Contrary To Controlling Decisions Of The Supreme Court, The District Court's Refusal To Consider Evidence Predating The Limitations Period And By Refusing To Consider Illegal Acts Committed By USGA *Within The Limitations Period* Because Handicomp Did Not Ascribe Particular Damages To Each Such Act. 25

A. The Courts Below Impermissibly Disregarded Evidence Predating The Limitations Period. 25

B. The District Court's Misreading And Unwarranted Extension Of This Court's Decision in *Klehr v. A.O. Smith Corp.* 27

C. USGA's Anticompetitive Acts *Within The Limitations Period* And The Lower Courts' Impermissible Compartmentalization Of Evidence. 28

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 491 (1988) 15, 16

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982) .. 15, 16, 21, 22

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) 22, 23, 30

Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263 (2nd Cir. 1979) 26, 27

Brunswick Holding Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1997) 22, 24, 25, 29

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 14

Continental Ore Company v. Union Carbide and Carbon Corporation, 370 U.S. 690 (1962) 18, 26, 28, 30

Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451 (1992) 14, 16

Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corporation, 995 F.2d 425 (3rd Cir. 1993) 22

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1967) 26

Cited Authorities

Page

In re Lower Lake Erie Iron Ore Antitrust Litigation, 998 F.2d 1144 (3rd Cir. 1003) 26

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) ..26, 27

Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp., 475 U.S. 574 (1986) 29

Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) 22, 23

Reazin v. Blue Cross and Blue Shield, 899 F.2d 951 (10th Cir. 1990) 19

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) 13, 26

United States v. Grinnell Corp., 384 U.S. 563 (1966) 17, 20

United States v. Microsoft Corp., 1999 WL 1001148 (D.D.C. 11/5/99) ..... i, 20

United States Football League v. National Football League, 842 F.2d 1335 (2nd Cir. 1988) 26

United States Golf Association v. St. Andrews Systems, 749 F.2d 1028 (3rd Cir. 1984) 14

Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969) 22, 23, 24

Cited Authorities

Page

Statutes:

15 U.S.C. § 2 1

15 U.S.C. § 15 1

15 U.S.C. § 26 1

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1337 1

Clayton Act, section 4 1

Clayton Act, section 12 1

Clayton Act, section 16 1

Sherman Antitrust Act, section 2 .....1, 16, 25, 28

Rules:

Fed. R. Civ. P. 56 14

S. Ct. Rule 10(a) 21

S. Ct. Rule 10(c) 16, 21, 25

TABLE OF APPENDICES

Page

Appendix A — Memorandum Opinion And Judgment Of The United States Court Of Appeals For The Third Circuit Dated And Filed March 22, 2000 ..... 1a

Appendix B — Memorandum Opinion And Order Of The United States District Court For The District Of New Jersey Dated And Filed April 13, 1999 ..... 12a

Appendix C — Order Of The United States Court Of Appeals For The Third Circuit Denying Petition For Rehearing Dated May 5, 2000 .... 40a

Appendix D — Relevant Statutes 42a

OPINIONS AND ORDERS ENTERED IN THE CASE

The opinions and orders in this case have not been reported. The Memorandum Opinion and Judgment of the court of appeals appear in Appendix ["App."] A to this petition and the Order on Petition for Rehearing appears in App. C (Case No. 99-5372). The Memorandum Opinion and Order of the district court appear in App. B (Civil No. 07-0296).

BASIS FOR JURISDICTION IN THE SUPREME COURT

The date of the judgment or order sought to be reviewed is March 22, 2000. App. A. The date of the Court of Appeals' order denying rehearing is May 5, 2000. App. C. The statutory provision believed to confer on the Supreme Court jurisdiction to review on a writ of certiorari the judgment or order in question is 28 U.S.C. § 1254(1).

THE STATUTES INVOLVED IN THE CASE

The statutes involved in this case are set out verbatim in App. D.

JURISDICTIONAL BASIS IN THE DISTRICT COURT

The basis for jurisdiction in the district court is 28 U.S.C. § 1337, and sections 4, 12 and 16 of the Clayton Act (15 U.S.C. §§ 15 and 26) for injunctive relief and to recover damages by reason of violations of Section 2 of the Sherman Act (15 U.S.C. § 2).

STATEMENT OF THE CASE

On May 29, 1996, Handicomp, Inc. ["Handicomp"] filed a private antitrust suit against the United States Golf Association ["USGA"] in the United States District Court for the Northern District of California under section 4 of the Clayton Antitrust Act alleging injury and damage caused by reason of USGA's violation of section 2 of the Sherman Antitrust Act by unlawfully acquiring a nationwide monopoly in the provision of golf handicap computation services to

regional golf associations. A-14.[1] The case was transferred to the District of New Jersey and docketed there on January 17, 1997.

On February 10, 1998, USGA filed a motion *in limine* to bar evidence of damages that occurred before May 29, 1992, four years before the filing of the complaint. A-170. Handicomp opposed USGA's motion and cross-moved for partial summary judgment. A-201.

On April 20, 1998, USGA filed its own motion for summary judgment. A-1904.

On August 28, 1998, a hearing was held on USGA's motions *in limine*, Handicomp's cross-motion for partial summary judgment and USGA's motion for summary judgment.

On April 13, 1999, the district judge granted USGA's motion for summary judgment and its motion *in limine* to bar evidence of damages that occurred before May 29, 1992. The district judge declared all other pending motions moot. App. B, pp. 12a-39a.

On May 7, 1999, Handicomp filed a notice of appeal in the United States Court of Appeals for the Third Circuit. A-2564. The appeal was argued on March 6, 2000, and on March 22, 2000, the court of appeals filed its Memorandum Opinion and Judgment affirming the summary judgment dismissing the complaint and granting USGA's motion *in limine*. App. A. Handicomp timely petitioned for rehearing and for rehearing *en banc*. On May 5, 2000, the court of appeals denied the petition for rehearing. App. C.

Handicomp now files this Petition for Certiorari in the United States Supreme Court.

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1. The references to "A-___" are to the record appendix filed in the court of appeals.

STATEMENT OF FACTS

FACTS RELEVANT TO USGA'S ILLEGAL MONOPOLY WHICH WERE IGNORED BY THE COURTS BELOW

A. USGA Has A 100% Monopoly As Golf's Rulemaker And Standard Setter.

USGA is the rulemaker and standard setting body for the sport of golf in the United States. It has been golf's governing body since 1894. App. A, p. 4a. As the court of appeals observed, "[t]he USGA has long-established regulatory relationships with this country's regional golf associations who receive their authority from the USGA to issue USGA Handicap Indexes, to rate golf courses, to conduct USGA championship tournament qualifying rounds and to administer locally USGA's Rules of Golf." App. A, p. 4a. USGA has complete control in administering amateur golf in the United States. The regional associations, who are co-conspirators with USGA in the monopolization of the handicap service industry, depend completely for their existence on the authority and official recognition they receive from the USGA. As USGA's executive director said, the associations are USGA's "mirror" at the regional level. A-289.

B. Handicomp's History In Brief.

Handicomp is a family-owned Michigan corporation that has been in the business of providing computerized golf handicap services to regional golf associations since 1968. A pioneer in the field, Handicomp was at one time one of the most successful firms in the industry. App. A, p. 3a; A-1947-1948. Handicomp realized an uninterrupted pattern of healthy growth and profitability until USGA entered the handicap service business. A-1438-1441. Since then, most competitors have been eliminated and Handicomp's business has been decimated, even though it offers a superior and less expensive service than does USGA. The evidence supports the conclusion that the injury caused is antitrust injury attributable to USGA's monopoly power and anticompetitive conduct.

C. USGA Enters The Handicap Service Business With GHIN And Acquires A Monopoly.

In 1981, USGA embarked on its first commercial business venture by forming the Golf Handicap & Information Network ["GHIN"] to sell golf handicap computation services to the same regional golf associations it empowers and allows to exist through the exercise of its governing body powers. A-1421-2. Before USGA entered the business, the industry was vibrant and market share was widely dispersed amongst approximately 40 active competitors, with no single competitor having a dominant market share. A-2066-2068. Within a short period of time, USGA acquired a dominant market share and competition was decimated, with but four firms remaining in the association market today. A-2067. Of the approximately 94 state and regional golf associations in the country, 67, or more than 70%, are under contract with USGA to have their players' handicaps calculated *exclusively* by GHIN. App. A, p. 4a. The competitor having the next largest market share after USGA has but 8%. A-2341. GHIN's top official (who was also USGA's Director of Handicapping) projected obtaining 100% of the market within the next few years. A-2316. *No new firm has successfully entered this industry since 1986.* A-2067.

For a period of more than 14 years following its inception, GHIN lost millions of dollars (A-460) and USGA used the income it received from the television revenues of the U.S. Open golf championship to keep GHIN afloat. A-290-291.

D. Barriers To Entry Are High.

There is much evidence that barriers to entry in this industry are insurmountable. They include: the exclusive and exclusionary relationships between USGA and its regional association surrogates that allow the associations to use USGA's valuable non-handicap-related trademarks; the overlapping committee memberships between USGA and the regional associations; USGA's manipulation of the rules of golf for GHIN's advantage; USGA's exercise of its power as governing body specifically to prevent new firms from entering the market

to compete with GHIN; and the "significant financial commitment" identified by Handicomp's experts as being necessary to the development of a program that allows a vendor's service to network with the regional associations across the country. A-1943, 1937, 1935, 1202-04, 1208-09, 1930-1931. These combine to create insurmountable barriers to entry. The record shows that USGA abuses its position as golf's supposedly neutral governing body in order to gain competitive advantages for GHIN and to disadvantage the competition. As a result, USGA has obtained a monopoly while offering a handicap service that is more expensive than and inferior to competing services, facts which are acknowledged even by associations using GHIN. A-385, 2001, 2006, 2007, 2010, 2112.

Contrary to well-established Supreme Court precedent, both the district court and the court of appeals refused to give *any* consideration to — much less draw inferences from — USGA's role as the standard-setter in the industry and the evidence that supports Handicomp's claim that USGA acquired its monopoly by persistently wielding its authority and rulemaking power to help its own commercial handicap service and to hurt competition. The record is replete with evidence that should have precluded the entry of summary judgment against Handicomp.

E. The USGA Handicap System And The Regional Associations' Role In Issuing "USGA Handicaps".

An essential part of USGA's role as governing body is to promulgate the rules of the USGA Handicap System which, when correctly employed, yield what is known as a USGA Handicap Index. Handicaps allow golfers of differing abilities to compete against each other in a meaningful way. The most widely recognized and used handicap is the USGA Handicap Index. A-1421-1, 1421-2. In order for golfers to participate in most golf tournaments from the local club level up to the U.S. Open Championship, a golfer must have a *USGA* Handicap. No handicap computation firm can compete unless its service utilizes the USGA Handicap System formula. According to

USGA's rules, only clubs and USGA-recognized golf associations (GHIN's market) are permitted to call the handicaps they issue USGA Handicaps. A-2118-2121.

USGA, which sells its GHIN handicap service only to the regional associations that are officially recognized by it, requires that the associations use GHIN exclusively as their handicap computation service. A-233, 305. USGA first permitted regional associations to identify the handicaps they issue as "USGA Handicaps" contemporaneous with USGA entering the handicap business with GHIN. A-2118-2121. Also, for the first time, USGA prohibited other handicap vendors from identifying the handicaps they produced as USGA Handicaps. A-1963. The GHIN contracts that USGA signs with the regional associations also contain a clause giving the associations the right to use valuable USGA trademarks that are unrelated to the GHIN handicap service, but which are related to USGA's role as golf's governing body. They include "USGA®" and "United States Golf Association®." A-339, 345. The ability of GHIN associations to use USGA trademarks that are related to USGA's role as the sport's governing body is a valuable inducement to use GHIN over competing services.

In addition, USGA and its GHIN customers actively foster the very damaging false impression prevalent in the marketplace that a golfer must have a handicap that is calculated by GHIN in order for it to be an official USGA Handicap Index. This knowingly false impression is allowed to persist "because it works in our [the GHIN association's] favor." A-2146, 2143-44, 2110, 2135.

F. USGA's Purpose In Monopolizing The Handicap Service Industry.

USGA's express purpose in monopolizing the market for handicap services is to insure that the USGA Handicap becomes the *only* handicap used in the United States. In his January 1981 letter, written to the executive directors of all

regional golf associations in the U.S., USGA's Senior Executive Director Harry Easterly stated GHIN's purpose to be:

> *that handicaps everywhere should be computed in the same manner (that is, according to the procedures described in the USGA Golf Handicap System)*, we were interested in investigating the possible use of computers to increase the number of golfers who possess handicaps, and to provide more consistent uniform handicaps across the country. [Emphases added.]

A-2079-80.

G. USGA's Abuse Of Power And The Manipulation Of The Rules Of Golf For GHIN's Competitive Advantage.

USGA has repeatedly changed the rules of the USGA Handicap System to prohibit innovations offered by firms that compete with GHIN, but which GHIN itself was unable to meet. For example, Handicomp offered its customers handicap updates at times requested by the customer. This was permitted by the USGA Handicap rules and was a very attractive feature because clubs using Handicomp's service could get updated handicaps for players participating in their tournaments, thus allowing for fairer competition. GHIN was unable to provide this level of service to its customers, so USGA changed the rules of the USGA Handicap System to require that handicaps be updated only in accordance with the schedule set by the regional association in the area where a golf club is located, *whether or not the golfer's club is a member of the regional association.* A-1965. If the club did not adhere to the association's update schedule, the handicap was not a valid USGA Handicap. The effect of this rule change was momentous. Since most regional associations were GHIN customers, the vast majority of the market calculated its handicaps according to the schedule that GHIN was able to accommodate. Since they updated only when GHIN allowed them to, it was GHIN that dictated update schedules and not the regional associations, as the rule suggests. By changing the rules to benefit GHIN, USGA destroyed

innovation, lowered the level of service available in the industry and killed an important incentive that clubs had to use Handicomp's service. The result was that clubs left Handicomp and went to the associations that offered the GHIN service. A-1965.

Discovery has shown that GHIN receives advance notice of changes in the USGA handicap rules and is allowed to schedule and even budget for the programming changes that will be necessary once USGA implements them. Only when GHIN is ready, fully budgeted and, in some cases, already embarked on programming rules changes, does USGA publicly announce the changes, thus requiring GHIN's competitors to drop their own projects in order to reprogram USGA's changes on an emergent basis in order to continue in compliance with the USGA Handicap System. A-2132-2134, 456, 458-459. This is costly, unfair and damaging to competition and last occurred in January 1998, *within the limitations period.* A-1928-1929, 1966-1967, 2107. In fact, USGA touts GHIN as the one service the customer can count on to always be in compliance with the USGA Handicap System, because it is the *USGA's* handicap service. Not only is this claim by USGA unfair, it is *untrue*. A-2143-2144, 2110, 2135, 2146.

In 1993, *within the limitations period*, USGA discovered that the software GHIN was using had a programming flaw that did not produce valid USGA Handicaps. GHIN concealed the defect and continued to churn out bogus handicaps until it could, at its leisure, get the problem fixed, all the while continuing to publicly claim that GHIN was the most desirable service available because it has the prestige of being associated with USGA and is always certain to comply with the USGA Handicap System. A-2122-2123, 2143-2144. GHIN always complies because USGA never enforces the rules against itself. On the other hand, USGA has rigorously demanded that GHIN's competitors be in full compliance with the USGA Handicap System at all times. A-2128. USGA has even demanded that firms competing with GHIN submit their marketing materials

to USGA for pre-approval and have even coerced competitors to change their sales literature. A-2112, 2106, 1963. *It is unheard of in business for a firm to demand, receive, and pre-approve its competitors' sales literature.*

H. USGA's Power To Create And Destroy Customers.

USGA has used its power as golf's governing body to help create, and then officially recognize, regional associations so that, once created, they could become GHIN customers. A-2091-2092, 2060. Conversely, it has used its power to refuse to recognize a new golf association precisely because it intended to use a handicap service other than GHIN. The failure of the new association to receive official USGA recognition doomed it. A-2029. When USGA helped create and then recognize the Metropolitan Amateur Golf Association in St. Louis in 1993 (*within the limitations period*), Handicomp's business in the St. Louis area was destroyed. A-1957-1959. USGA has what may well be the singular power in business today to actually create customers for itself and destroy the customers of competitors.

As stated, USGA recognizes and empowers the regional associations to administer USGA's rules, rate golf courses and conduct qualifying rounds for USGA championships. Some 72% of these associations provide the GHIN handicap service to their members exclusively. The facts show that GHIN is an inferior and more expensive service. In other words, associations select GHIN on the basis of considerations other than quality or price. The reason is due to USGA's improper relationships with officials of the regional associations who decide which handicap service their associations will buy.

I. USGA's Abuse Of Its Position As Golf's Governing Body To Unfairly Curry Favor With The Regional Associations.

According to USGA's own rules, six of the 16 members of USGA's all-powerful executive committee must be past officers or members of the governing bodies of regional associations. A-286, 407-408. In addition, association officials are regularly

appointed to the many other prestigious committees of USGA. In particular, there has been virtually identical membership on USGA's Handicap (*i.e.*, rule-making) Committee and USGA's GHIN (*i.e.*, commercial enterprise) Committee. The executive directors of all the regional associations are automatically made members of USGA's Regional Associations Committee. A-1956-1957, 2022, 2023. USGA holds an honorary seat on the boards of the regional associations which, by USGA's own admission, allows USGA's representative to "protect[] the interests of USGA." A-2060. No competitor has anything like this degree of access to and influence with the regional associations that comprise the market. These interlocking memberships continue to give USGA an enormous advantage in gaining entré to the associations and retaining customers that no competitor can hope to match. As a result, USGA never lost a significant GHIN customer. A-1949, 2006.

Regional association fealty to USGA was exemplified in 1995 (*well within the limitations period*) when members of the Kentucky Golf Association ["KGA"], a GHIN customer, expressed dissatisfaction with GHIN and urged KGA to entertain bids from other vendors when KGA's GHIN contract expired. Several firms made proposals, including Handicomp. A-1055. USGA officials weighed-in in favor of GHIN and placed heavy pressure on KGA decision makers to extend GHIN's contract. KGA officials acknowledged GHIN's higher price and poor quality but decided to sign a new GHIN contract because they feared that switching from GHIN would stigmatize the KGA as being disloyal to USGA. The most influential official who insisted that the KGA stay with GHIN was Bobby Owens, a former *KGA* president, *KGA* board member, and a member of *USGA's* Handicap Procedures Committee and *USGA's* Sectional Affairs Committee. Owens urged KGA not to switch from GHIN *despite the large annual savings he admitted KGA would realize because, he said, any switch would lead to questions from KGA members about what GHIN was really costing them and this had to be avoided.* A-2013-2017.

Despite offering better service and lower prices, none of the other handicap services, including Handicomp, were seriously considered. They did not have a chance.

J. USGA's Agreement To Kickback GHIN Profits To The Associations.

Another anticompetitive policy of USGA that cements USGA's hold on market power, while allowing the consumer to be overcharged, is USGA's stunning policy of kicking back its GHIN profits to its association customers. A-530-531. This allows USGA to overcharge the associations for GHIN, and the associations to in turn overcharge golfers at the club level for their handicaps. This results in exorbitant overpricing to clubs and golfers who ultimately must foot the bill by higher dues payments and who receive none of the benefits of the kickbacks.

K. The McKinsey Study And USGA's Anticompetitive Conduct.

In a secret study performed for USGA by McKinsey and Company in October 1991, USGA's intention to use its rulemaking power for anticompetitive purposes was disclosed. The McKinsey study says:

> 1. GHIN has done an excellent job of obtaining its objectives.
>
> A. Interviews with members of [USGA's] Executive Committee confirm that GHIN's primary objective as a handicapping service is to help associations grow their membership and revenue — *directly by serving associations that choose GHIN over other vendors and indirectly by influencing industry standards and prices.*
>
> B. GHIN has established a strong position in the handicap computation business, having grown rapidly since its inception in 1981.
>
> . . . .

> 3. As a result, GHIN has become a well-established service and in 1992 *will compute handicaps for almost 70% of the 1.8 million golfers receiving handicaps through associations. . . .*

A-362 [emphases added].

The McKinsey Study shows USGA's intention to use its power as rulemaker to "influence industry standards" and thereby favor its own GHIN customers at the expense of associations using competing services.[2] The district court and court of appeals refused to consider this evidence of USGA's anticompetitive intent because the McKinsey Study predated the four year limitations period. As discussed below, this ruling is contrary to well established Supreme Court precedent.

L. The GHIN Feasibility Study And USGA's Early Intention To Quickly Acquire Market Power.

Additional evidence of USGA's intention to acquire monopoly power became known when, on January 28, 1998, following an order by the magistrate, USGA produced a GHIN Feasibility Study which was written in 1980, *before* USGA had even entered the handicap service business. USGA projected enormous growth within the first 3½ years of GHIN's existence:

> Growth projections for G.H.I.N. are to handle approximately *600,000* handicaps by 1984. This is fifty-four percent (54%) of the market controlled, in the major part, by Golf Associations.

A-322.

This projected market share was well in excess of the *combined* market shares of the other service providers, including Handicomp, which had then been in business for more than 13 years. A-325. Remarkably, USGA projected attaining this market share without the need even to market GHIN. A-417.

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2. This is consistent with the intention to monopolize the handicap market described by USGA executive director Easterly. *See* p. 7, *supra*.

M. Evidence Of USGA's Monopoly Power.

That USGA has monopoly power (*i.e.*, the power to exclude competition and raise prices) is evidenced by GHIN's disproportionately high market share, GHIN's high price and low quality and the absence of new entrants into the industry since 1986. In addition to the exercise of USGA's power to exclude competition by controlling the decision makers at the association level and creating or destroying associations depending on whether they intend to become GHIN customers, USGA actually took affirmative steps to destroy a new competitor, US Links, solely because USGA officials viewed the firm as a potential competitor of GHIN. This was accomplished quite simply by USGA's executive director sending a letter to the executive directors of all the regional associations disparaging the new entrant. The letter became known in the industry as the "Unabomber Letter" and it put US Links out of business within weeks. A-1930-1932.

Despite the above evidence, the district court entered summary judgment in favor of USGA and dismissed Handicomp's complaint. The court of appeals affirmed. The decisions of both courts are contrary to a veritable laundry list of antitrust decisions issued by the Supreme Court, beginning with the *Standard Oil* case.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit Erred In Affirming The Grant Of Summary Judgment Against Handicomp When It Failed To Consider, In Conflict With The Holdings Of The Supreme Court, USGA's Abuse Of Its Monopoly Power As The Industry's Governing Body And Standard Setter In Order To Obtain Competitive Advantages For Its Own Commercial Handicap Computation Service.

The Supreme Court should grant *certiorari* in this case because the courts below, in granting summary judgment in favor of USGA, ignored controlling Supreme Court precedent that requires a heightened level of antitrust scrutiny when a firm

competes in an industry in which it is also the standard setter. If the Court does not grant review, USGA will have succeeded in obtaining and permanently maintaining a nationwide monopoly in golf handicap computation services that has destroyed competition and resulted in excessively high prices to the more than 70% of the market that now uses USGA's inferior service and, potentially, for the 100% of the market that USGA projects it will have in the near future. The likelihood that USGA would parlay its rule making monopoly into a monopoly in the provision of handicap services was forewarned by the Third Circuit in *United States Golf Association v. St. Andrews Systems,* 749 F.2d 1028, 1034 (3rd Cir. 1984):

> The U.S.G.A. standard is like an 'industry standard': it allows the handicaps calculated by different providers to be compared with one another, much as the standard gauge of railroad track allows a locomotive of one company to run on the track of another. Allowing one provider to obtain exclusive rights in such a standard would enable it to *exclude competitors* desiring to provide the same product or service, particularly if the original provider, such as the U.S.G.A. in this case, starts with a *virtual monopoly*. [Emphases added.]

In the end, USGA achieved this result by giving its GHIN customers, the regional association surrogates, the authority to issue USGA Handicaps while simultaneously taking that right away from the other handicap service providers.

Summary judgment may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The evidence of [the non-moving party] is to be believed, and all justifiable inferences are to be drawn in [its] favor. . . . [The non-moving party's] version of any disputed issue of fact thus is presumed correct. . . ." *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992) [internal quotation

marks and citations omitted]. The overwhelming evidence shows that USGA had the intent to monopolize the handicap computation industry and illegally used its natural monopoly power as golf's governing body to achieve that end. Furthermore, the antitrust scrutiny which an industry standard setter is supposed to receive was ignored by the courts below.

It is a well established rule of the Supreme Court that an antitrust defendant who is the rulemaker/standard setter in an industry in which it competes is held to a very high level of antitrust scrutiny. *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 491 (1988). This Court has said that:

> [A] standard-setting organization like ASME can be rife with opportunities for anticompetitive activity. Many of ASME's officials are associated with members of the industries regulated by ASME's codes.

and

> Thus, a rule that imposes liability on the standard-setting organization — which is best situated to prevent antitrust violations through the abuse of its reputation — is most faithful to the congressional intent that the private right of action deter antitrust violations.

American Society of Mechanical Engineers v. Hydrolevel Corp., supra at 571, 572-73.

This Court has also held that:

> [P]rivate standard-setting by associations comprising firms with horizontal and vertical business relations is permitted at all under the antitrust laws only on the understanding that it will be conducted in a *nonpartisan manner offering procompetitive benefits.*

Allied Tube & Conduit Corp. v. Indian Head, Inc., supra at 506-07 [emphasis added].

Despite Handicomp's entreaties to the district and appeals courts, both failed to even mention these cases, much less review USGA's actions in the context of its role as rulemaker. This failure led to the plainly erroneous conclusion by the court of appeals that Handicomp had failed to present evidence of anticompetitive conduct by USGA.

If the *Hydrolevel* and *Indian Head* cases are to have any meaning, it is in the context where a standard setter such as USGA has abused its power and reputation to achieve unfair competitive advantages for its commercial business and destroyed competition in the industry. This Court should grant *certiorari* because the court of appeals has "decided an important federal question in a way that conflicts with relevant decisions of [the Supreme Court]." S. Ct. Rule 10(c).

II. The Third Circuit Erred In Holding, In Conflict With The Tenth Circuit Court Of Appeals, That The Only Relevant Barrier To Entry Into The Industry Is The Difficulty Associated With Creating The Product Or Service.

The court of appeals affirmed the district court's dismissal of the complaint because, the court concluded that, in order to establish a Sherman Act § 2 monopoly claim, Handicomp had to demonstrate possession of monopoly power and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident." App. A, p. 5a. (*citing Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992)). The court of appeals held that there is insufficient evidence in the record from which the trier of fact could conclude that these two elements exist. The court's conclusion is based on a fundamentally flawed analysis which conflicts with a decision of the Tenth Circuit Court of Appeals on the same issue. The Supreme Court should settle the important antitrust issue whether barriers to market entry are to be determined solely by reference to the ease or difficulty that is associated with creating the product or service.

The Supreme Court has said that monopoly power "ordinarily may be inferred from the predominant share of the market." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966). Here, USGA's large share of the market (72%+), together with the low shares of the four other surviving competitors, none of whom has more than 8%, alone gives rise to an inference of monopoly power that is sufficient to withstand summary judgment. The court of appeals appears, at least initially, to acknowledge this and cites several Supreme Court cases in support of its statement that "market share is important in determining the existence *vel non* of illegal monopoly power." App. A, p. 7a. The court goes on, however, to say that, despite USGA's large market share — and presumably the inference of monopoly power that should flow therefrom — the court "must determine whether USGA excluded competition." *Ibid.* In disregard of the evidence of market exclusion that appears throughout the record, much of which is described above, the court of appeals concluded that summary judgment was properly entered against Handicomp because it is relatively easy to write a software program that can calculate a handicap. The critical and fundamentally erroneous holding of the court of appeals is quite remarkable:

> Handicomp is unable to prove substantial barriers to entry because the astronomical reaches of computers and cyberspace form the backdrop of our new millenium. If not child's play, a skilled teen age hacker today would have no difficulty in programming a data processing system to register the rating slope of a golf course and the gross score of a golfer and produce a handicap.

App. A, p. 8a.

The ability to write a program to calculate a handicap has little to do with the formidable barriers that prevent firms from gaining entré into the market. Here, USGA has used its monopoly power as rulemaker to lock up the regional association market by, among other things: (1) entering into exclusive

dealings contracts; (2) misusing its non-handicap-related trademarks; (3) manipulating the rules of golf to benefit GHIN and stifle innovation by competitors; (4) improperly influencing decision makers at the regional association level; (5) having USGA representatives on the regional associations' governing boards to protect USGA's interests; (6) giving the association customers kickbacks of USGA's GHIN profits; (7) creating and granting official USGA recognition to regional associations so that they can become GHIN customers; (8) falsely claiming that GHIN, in contradistinction to competing services, always complies with the USGA Handicap System; and (9) falsely claiming that, in order to have a valid USGA Handicap, one's handicap must be computed by GHIN. All of these actions conspire in a cumulative way to lock competitors out of the market, regardless of how easy it may be to write a program that calculates a handicap. The courts below were required to consider them together. *See Continental Ore Company v. Union Carbide and Carbon Corporation,* 370 U.S. 690, 698-99 (1962). They did not consider them at all.

When one considers these facts, together with USGA's enormous market share, high price, low quality, the whittling of competitors from 40 to four, and the fact that *there have been no new entrants into this market since 1986*, it is inconceivable that the court of appeals could have concluded that USGA and the regional associations have not excluded competition, much less that an inference of exclusion cannot be drawn. Indeed, the record contains direct evidence that, in at least one instance, USGA not only excluded US Links from the market, it destroyed the firm, precisely because USGA officials viewed it as a potential GHIN competitor. The evidence also shows that by creating and then recognizing the Metropolitan Amateur Golf Association, Handicomp was deliberately excluded from the market in St. Louis and injured. This is *direct evidence* of market exclusion that does not even require the drawing of inferences. The courts below ignored the evidence that shows the existence of substantial entry barriers

and their decisions conflict with the Tenth Circuit's holding in *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951 (10th Cir. 1990).

Whereas the Third Circuit erroneously concludes that entry barriers are limited to the difficulty and expense associated with producing a product or service with competitive characteristics, the Tenth Circuit has correctly recognized that proper analysis of entry barriers is not so limited and must include other relevant considerations. Principal sources of entry barriers include legal license (here, USGA's control over the rules of golf and, in particular, the USGA Handicap System; the right given to regional associations to use USGA's trademarks and to designate the handicaps produced by the associations as "USGA Handicaps"), control over an essential or superior resource (here, USGA's privileged access to the decision makers of the associations that comprise the relevant market, its control over the handicap system and its power to create or destroy associations) and entrenched buyer preferences (here, the desire of associations to have the prestige of being associated with USGA, the desire of regional association officials to be appointed to USGA committees, the desire to avoid being stigmatized as "anti-USGA" if an association were to drop GHIN in favor of a competing service, and the fostered false assumption that a golfer needs a handicap calculated by GHIN in order to have the indispensable USGA Handicap). *Id.* at 968. When these facts are considered, together with USGA's enormous market share and the small shares held by the few remaining competitors, monopoly power must be presumed. *Id.* at 969-70. Just as important, the evidence that USGA charges substantially higher prices for an inferior service and has still been able to maintain and even expand its share of the market is strong evidence of USGA's power to control prices. *Id.* at 970.

Direct evidence that USGA excluded competition (*Id.* at 971) and set GHIN's prices without any consideration for what the market would bear is proof of USGA's monopoly power. USGA's Director of Finance testified in his deposition

that USGA set GHIN's price without giving any consideration to the price at which the service needed to be sold for it to be competitive and it did not make any difference to USGA whether GHIN was priced higher or lower than the competition. A-354 and 417. It has recently been held that this alone is evidence of monopoly power:

> Microsoft's actual pricing behavior is consistent with the proposition that the firm enjoys monopoly power. . . . The company's decision not to consider the prices of other vendors' . . . systems when setting the price of Windows 98, for example, is *probative of monopoly power.* One would expect a firm in a competitive market to pay much closer attention to the prices charged by other firms in the market.

United States v. Microsoft Corp., 1999 WL 1001148, 17 (D.D.C. 11/5/99) [emphasis added]. Furthermore, USGA's manipulation of the rules of golf in order to disadvantage the competition is a dangerous tool for inflicting injury and sustaining high entry barriers. *Id.*, 1999 WL 1001148 at 24-35 and 113-14. Giving consideration to these facts leads inevitably to the conclusion that entry barriers are substantial and that USGA has the power to control prices and exclude competition and has, in fact, done so.

The analysis engaged in by the Third Circuit conflicts with the sensible, comprehensive approach taken by the Tenth Circuit in *Reazin* and the recent decision in *Microsoft*. The Third Circuit's different analysis yields a different result, thereby requiring that the Supreme Court settle this important issue of antitrust law.

The evidence strongly supports the conclusion that Handicomp has met the two part showing needed to take a Sherman Act § 2 claim to the jury: "(1) the possession of monopoly power in the relevant market, and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *United States v. Grinnell Corp.*, 384 U.S. at 570-71.

Giving Handicomp the benefit of all reasonable inferences, it is clear that USGA has monopoly power and the Supreme Court should grant *certiorari* to correct the error by the Third Circuit and reconcile the conflict between the Third and Tenth Circuits. S. Ct. Rule 10(a), (c).[3]

III. The Third Circuit Erred When It Held, In Conflict With Decisions Of The Supreme Court, That Handicomp Had Not Demonstrated Antitrust Injury.

The Third Circuit's holding that Handicomp did not suffer antitrust injury as a matter of law was plainly erroneous and contrary to the Supreme Court's holdings in *American Society*

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3. Like the court of appeals, the district court failed to consider the evidence of entry barriers that is described above and concluded that barriers to entry are low. In so concluding, the district court also focused on the ease with which one can produce software to calculate a handicap and misconstrued Handicomp's experts' testimony (App. B, pp. 26a-28a, 35a-36a, n.8) in reaching the erroneous conclusion that entry barriers are low. Handicomp specifically addressed the district court's error in its opening brief in the court of appeals and it appears that the court of appeals did not adopt the district judge's view of the experts' deposition testimony. This is important because the experts had testified that barriers to entry, which include GHIN's affiliation with USGA, GHIN's market dominance, the associations equating the use of GHIN with support for USGA as governing body, and the false belief that one needs a handicap from a GHIN association in order to have a valid USGA Handicap, are high. A-1202-04, 1208-09. Although the court of appeals did not adopt the district judge's erroneous findings relative to the experts' testimony, the court did mistakenly conclude that the only barrier that matters is the one associated with the difficulty inherent in writing software that can calculate a handicap. The district court also erroneously found that, not one, but two firms had entered the market since 1986. Handicomp sought to correct this error in the court of appeals and, indeed, it does not appear that the appeals court adopted the district judge's finding. In point of fact, there has been only one successful entrant into the market in 16 years and that firm, Sumner, Inc., was able to survive only by targeting a few associations that were not on GHIN and, in so doing, knocked Compugolf, one of the few service providers then remaining in business, out of business. A-2067, 1949, 2006.

of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982); *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100 (1969); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); and *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). In addition, the district court's conclusion that Handicomp failed to show antitrust injury results from a misreading of this Court's decision in *Brunswick Holding Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977) and amounts to an ill-advised and unwarranted extension of the holding in that case.

It is inferable from the evidence that injury to competition, to competitors, and to Handicomp has occurred as a result of USGA's anticompetitive acts. Competition has been decimated, innovation has been stifled and the consumer is paying a higher price for an inferior service. Handicomp has had attractive features of its service nullified by rules changes adopted by USGA because GHIN was unable to meet them. As a consequence, Handicomp lost identifiable business to GHIN. USGA helped create the Metropolitan Amateur Golf Association and then immediately signed the association up as a GHIN customer. This cost Handicomp its St. Louis area business. USGA did the same thing in Pennsylvania, Texas and elsewhere. A-2091-2092, 2060. Controlling decisions of the Supreme Court require the conclusion that this type of injury is classic antitrust injury. Indeed, the Third Circuit had previously held that "decreased competition . . . is the type of harm targeted by the antitrust laws" and evidence of injury to the plaintiff is sufficient if plaintiff is a competitor or a consumer in the relevant market. *Gulfstream III Associates, Inc. v. Gulfstream Aerospace Corporation*, 995 F.2d 425, 429 (3rd Cir. 1993) [internal quotations and citations omitted].

The lower courts focused on the effect on Handicomp (which is, we submit, alone sufficient to withstand summary judgment), but did not give consideration to the "impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Aspen Skiing Co.*, 472 U.S. at

605. The courts erred in not doing so. Furthermore, they were required to

> conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to plaintiffs.

Zenith Radio, 395 U.S. at 123-24. This they also failed to do.

This case is analogous to *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., supra.* In *Radiant Burners,* plaintiff's gas burner did not receive the seal of approval from the American Gas Association, although it was safer and more efficient than, and just as durable as, gas burners which AGA had approved. *Id.,* 364 U.S. at 658. Although Handicomp can theoretically market its service, it has had to "dummy it down" to the standards that USGA's rules require so that GHIN can remain competitive. As a consequence, Handicomp has lost business to GHIN and been unable to gain the new business that its innovative service would have otherwise attracted. USGA's actions, in concert with its regional association customers, have, "by [their] nature and character, a monopolistic tendency. As such it is not to be tolerated merely because the victim is just one manufacturer whose business is so small that his destruction makes little difference to the economy." *Radiant Burners*, 364 U.S. at 660 [internal quotes and brackets omitted].

Finally, the district court concluded that Handicomp has not suffered *any* antitrust injury because of one element of its damage claim in which it alleges that USGA's anticompetitive conduct resulted in the artificial depression of Handicomp's prices by 25%. The district court mischaracterized this as being "[t]he center of Plaintiff's damage claim" and refers to page 2 of Handicomp's initial disclosures. App. B, p. 33a. That document shows, however, that Handicomp's lost profits within

the limitations period and future lost profits total $4,966,900, and that the 25% figure is but an enhancement to damages based on the artificial depression of Handicomp's prices caused by USGA. It was never a central claim, but merely one element of Handicomp's injury. A-1564. It is not based on the fact that GHIN merely competed against Handicomp. Nothing prevents Handicomp from recovering damages resulting from the excessive downward pressure on its prices caused by USGA's illegal conduct. The Supreme Court has cited "evidence of the decline in *prices*, profits and values, not shown to be attributable to other causes" as proof "that defendant's wrongful acts had caused damage." *Zenith*, 395 U.S. at 123-124 [emphasis added]. The evidence further shows that Handicomp's prices, even if 25% higher, would still be *below* GHIN's, giving more consumers a superior, *less expensive* service.

The district judge misapplied this Court's holding in *Brunswick Holding Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1997). This case is not, as the district judge held, about Handicomp complaining that USGA has simply competed against it. App. B, p. 33a. Rather, it has to do with the manner in which USGA sells GHIN. In his certification, Handicomp's damage expert, Dr. Upton, describes the rationale underlying his report. A-509. He says that USGA's massive subsidization of GHIN's losses played an important role in GHIN's success; damages are calculated on the basis of what would have happened if GHIN was forced to compete on the merits like other firms; it was never intended by USGA that GHIN operate as a stand alone enterprise; the development and marketing of GHIN was coordinated with USGA's role as overseer of the handicap system; standing alone, GHIN would have had modest sales, but it would have been limited by its ability to attract capital and its commitment to rebate all profits to its association customers; and finally, Handicomp's lost profits take into account the impact of other non-USGA competitors. The marketing of GHIN was completely unlike that involved in the operation of the bowling alleys in *Brunswick*. First, GHIN was

never marketed separate from the parent organization; GHIN was always intended to be an integral part of USGA and USGA used its power and influence to promote it. In *Brunswick,* on the other hand, plaintiffs would have suffered the same injuries even if the bowling alleys were run by a third party. That is not the case here, where, without USGA's influence and subsidies, GHIN would have failed. A-510-511. *Brunswick* is inapposite and the district judge's reliance on *Brunswick* was error.

This Court should grant *certiorari* and correct the decisions of the courts below, in order to bring them into conformity with the governing authority of the Supreme Court. S. Ct. Rule 10(c).

IV. The Third Circuit Erred When It Affirmed, Contrary To Controlling Decisions Of The Supreme Court, The District Court's Refusal To Consider Evidence Predating The Limitations Period And By Refusing To Consider Illegal Acts Committed By USGA *Within The Limitations Period* Because Handicomp Did Not Ascribe Particular Damages To Each Such Act.

A. The Courts Below Impermissibly Disregarded Evidence Predating The Limitations Period.

In granting USGA's motion *in limine,* the district court decided, and the court of appeals affirmed, that Handicomp "cannot rely on Defendant's conduct prior to May 29, 1992, including the various actions taken by Defendant in the 1980's, in support of its claim for damages under Section 2 of the Sherman Act." App. B, pp. 21a-22a. In so holding, the courts below refused to consider all pre-May 29, 1992 evidence *for all purposes* and this was contrary to long-standing Supreme Court precedent. After excluding the pre-May 29, 1992 evidence (including the evidence of USGA's illegal intent, motive and method revealed by the McKinsey Study, Easterly letter and GHIN Feasibility Study) the district court then looked at the remaining "three distinct post-May 29, 1992 events" to see if, in isolation, they support a claim of monopolization under § 2 of the Sherman Act. The district judge concluded they do not.

App. B, pp. 21a-22a. The court of appeals affirmed, without discussing the district court's misreading of the Supreme Court's decision in *Klehr v. A.O. Smith Corp., supra* or its failure to adhere to this Court's decisions in the *Standard Oil, Continental Ore* and *Hanover Shoe* cases, *infra.* App. A, pp. 4a-5a.

It has been the law of antitrust since the *Standard Oil* case that evidence of acts occurring before the limitations period is admissible to show a defendant's intent to monopolize the market, its motivation for doing so, and the method by which it was achieved. *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 75-76 (1911) [consideration of evidence of defendant's acts in 1879-1882, *before passage of the Sherman Act* in 1890, was essential to determine the intent or purpose of the founders of Standard Oil]; *Continental Ore Company v. Union Carbide and Carbon Corporation,* 370 U.S. at 709-710 and n.15 [exclusion of evidence pre-dating the limitations period was error where the evidence was material to claim of conspiracy and monopolization]; and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502, n.15 (1967) [defendant's conduct "inflicted continuing and accumulating harm" and although plaintiff could have sued in 1912, it was equally entitled to sue in 1955]; *see also United States Football League v. National Football League*, 842 F.2d 1335, 1371 (2nd Cir. 1988).

"[A] purchaser suing a monopolist for overcharges within the previous four years may satisfy the *conduct prerequisite to recovery by pointing to anticompetitive actions taken before the limitations period.*" *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 296 (2nd Cir. 1979) [emphasis added]. Where the antitrust offense is a continuing one, a plaintiff is permitted to assert a claim, both when offenses are first committed, and at any later time during which the conspiracy continues to affect him. *Hanover Shoe,* 392 U.S. at 502, n.15.

In the case of continuing antitrust violations, the statute of limitations will not bar recovery where the conspiracy continues into the limitations period. *In re Lower Lake Erie Iron Ore Antitrust Litigation,* 998 F.2d 1144, 1172 (3rd Cir. 1003)

("[O]vert acts aren't what cause damage. It is the effectiveness of the overall conspiracy that causes damages.") [internal quotes omitted].

The refusal of the district court to consider evidence of USGA's earliest intent, motive and method of the conspiracy by which it undertook to acquire and finally did acquire its monopoly was prejudicial error.

B. The District Court's Misreading And Unwarranted Extension Of This Court's Decision in *Klehr v. A.O. Smith Corp.*

The district judge cited but one case, *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), in support of his decision to disregard all USGA acts occurring before May 29, 1992. *Klehr* does not require the exclusion, on limitations grounds, of relevant evidence that predates the limitations period. Neither does it stand for the proposition that, in the case of a continuing antitrust conspiracy, a plaintiff who can show the continuation of the conspiracy into the limitations period must also show an overt act within the period. If this were the rule, an illegally obtained monopoly and its damaging effect on the marketplace would be forever protected where the offender committed all overt acts more than four years past. *See Berkey Photo v. Eastman Kodak,* 603 F.2d at 296. *Klehr* did not change the rule that an antitrust conspiracy which continues into the limitations period allows an injured party to recover for the continuing damage from the conspiracy, irrespective of when the last overt act occurred. Had this Court intended in *Klehr* to reverse its prior holdings involving the statute of limitations in the context of continuing antitrust conspiracies, it would, presumably, have said so. Unless corrected, this misapplication of *Klehr* will result in a judicially created safe harbor for monopolists that this Court never intended.

The pre-May 29, 1992 evidence excluded by the district court is admissible to show the creation of the conspiracy and its continued existence today. The district court's ruling is erroneous because it fails to consider damages Handicomp

suffered *after* May 29, 1992, as the result of acts that occurred *before* that date. The court thus excluded almost all evidence of USGA's intent to monopolize, and much of the evidence of USGA's illegal acts.

C. USGA's Anticompetitive Acts *Within The Limitations Period* And The Lower Courts' Impermissible Compartmentalization Of Evidence.

The district court then turned to what remained of Handicomp's case and examined "three distinct post-May 29, 1992 events upon which [Handicomp] claims it may base its action under Section 2 of the Sherman Act," in order to determine whether Handicomp had any compensable claims remaining. App. B, pp. 21a-22a. The district court's methodology, focusing as it did on "three distinct . . . events," violated the long-established rule in *Continental Ore v. Union Carbide*:

> It is apparent that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . . The character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

Id., 370 U.S. at 698-699.

In order to prevail on a § 2 Sherman Act claim, a plaintiff must prove: (1) anti-competitive conduct; (2) monopoly power; and (3) anti-trust injury. The court below concluded that Handicomp "cannot establish" any of these elements. App. B, p. 23a. This erroneous conclusion is attributable to several errors made by the district court. First, excluding all evidence of USGA's pre-May 29, 1992, conduct made it more difficult for Handicomp to show anti-competitive conduct, since many of the acts occurred before May 29, 1992. Second, the district judge's misinterpretation of the Supreme Court's

decision in *Brunswick Holding Corp. v. Pueblo Bowl-O-Mat, Inc., supra,* led him to erroneously conclude that Handicomp had not suffered antitrust injury. Third, the district and appeals courts ignored virtually all of plaintiff's evidence showing USGA's monopoly power. The evidence, which is reviewed above, establishes the requisite elements and shows that the courts below did not give Handicomp the benefit of any reasonable doubts or inferences. *See Matsushita Elec. Indus. Co. Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

The district judge concluded that no evidence exists to show that USGA "excluded Plaintiff from *offering* its computerized handicap computation services to [the Metropolitan Amateur Golf Association] or that Defendant did anything to control prices after the formation of MAGA." App. B, p. 30a [emphasis added]. This betrays a fundamental misunderstanding of the issue, which is not whether Handicomp could have *offered* its service — strictly speaking anyone can offer a product or service in a monopolized market — but whether it was effectively *excluded* from the association market when MAGA was formed precisely to make it a GHIN customer.

Similarly, in the process of renewing the Kentucky Golf Association's GHIN contract in 1995, the full weight of pressure from USGA and USGA/KGA officials was brought to bear and normal considerations of better price and service were expressly rejected in favor of non-market considerations — *i.e.*, the need to retain favor with USGA, avoid being seen as anti-USGA and having to answer to the membership about GHIN's high cost and inferior service. The result was preordained. No one, save GHIN, had a chance.

Similarly, rules changes took effect in January 1998, well within the limitations period, and they were calculated to provide GHIN with advance notice and were timed so as to place competitors under pressure to reorder their priorities and reprogram on an emergency basis in order to be able to show ongoing compliance with the USGA Handicap System.

The approach used by the district judge, compartmentalizing claims and requiring proof of damages with respect to each individual claim, is exactly the analysis condemned by the Supreme Court in *Continental Ore*, 370 U.S. at 698-699, and it ignores the overall effect on competition generally. *See Aspen Skiing*, 472 U.S. at 605.

CONCLUSION

Petitioner Handicomp respectfully requests that this Court grant *certiorari* and review these important questions of federal law in order to correct the decisions of the courts below which conflict with controlling Supreme Court precedent, and to settle the conflict between the circuits.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 22, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5372

HANDICOMP, INC.,
A MICHIGAN CORPORATION

v.

UNITED STATES GOLF ASSOCIATION,
A DELAWARE CORPORATION

Handicomp, Inc.,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
D.C. No. 97-cv-00296
District Judge: Honorable Garrett E. Brown, Jr.

Argued March 6, 2000

Before: SCIRICA, ALITO and ALDISERT,
Circuit Judges.

(Filed: March 22, 2000)

Appendix A

MEMORANDUM OPINION

ALDISERT, *Circuit Judge.*

The game of golf is a matter of measurement. Each golf course is designed so that a skilled golfer can play eighteen holes in a regulation number of strokes, generally 72, known as par. Golf professionals can usually play a round in less than par, but virtually all amateurs score higher. Players' scores are recorded and regularly averaged and the difference between the average of the scores and par is known as a handicap. The handicap is designed to "level the playing field" so that players with different degrees of expertise can compete together and participate in tournaments. Public courses and private country clubs have their courses evaluated in degrees of difficulty, generally described as a course rating or slope.

Computer software, in the form of data processing services, is designed to store the rating/slope of various golf courses and clubs and to collect the actual gross scores of golfers after they complete their rounds. The data processing systems determine a handicap for each player by combining the rating/slope of each golf course and the gross scores of players. Handicap computer software and services are manufactured and distributed by various companies that sell their systems to regional golf associations of courses and clubs, for example, the Southern California Golf Association.

The parties to these proceedings are competitors in providing computer handicap services to golf associations. Appellant Handicomp established its computerized handicap

business in 1968. The United States Golf Association ("USGA") operates a handicap index computation program known as Golf Handicap and Information Network ("GHIN"). On May 29, 1996, Handicomp brought this action under § 2 of the Sherman Act, 15 U.S.C. § 2, and § 4 of the Clayton Act, 15 U.S.C. § 15(a), alleging a conspiracy between the USGA and its regional associations to violate antitrust laws. On March 13, 1998, Handicomp filed a motion to amend and supplement its complaint under Rule 15(a), (d), Federal Rules of Civil Procedure, in order to add claims under § 2(c) of the Robinson-Patman Act, 15 U.S.C. § 13(c), for commercial bribery, § 3 of the Clayton Act, 15 U.S.C. § 14, for exclusive dealings contracts lessening competition and tending to create a monopoly, and a claim alleging fraudulent concealment.

The district court determined that Handicomp cannot prove (1) antitrust injury, (2) that USGA has monopoly power or (3) anti-competitive conduct.

Because the parties are familiar with the facts and proceedings, our discussion will not be extensive and will be limited to a discussion of the Sherman Act allegations. For reasons that follow we affirm the judgment of the district court on the basis that Handicomp cannot prove actual or imminent monopoly power or anti-competitive conduct.

The district court had jurisdiction pursuant to 28 U.S.C. § 1337. This court has jurisdiction over a final order of the district court under 28 U.S.C. § 1291. Notice of appeal was timely filed. Rule 4(a), Federal Rules of Civil Procedure.

Appendix A

I.

The USGA has been the governing body of amateur golf in the United States since 1894. *United States Golf Association v. St. Andrews Systems, Data-Max, Inc.*, 749 F.2d 1028, 1030 (3d Cir. 1984). The USGA has long-established regulatory relationships with this country's regional golf associations who receive their authority from the USGA to issue USGA Handicap Indexes, to rate golf courses, to conduct USGA championship tournament qualifying rounds and to administer locally USGA's Rules of Golf. App. at 407-408. There are approximately 94 regional associations throughout the country, 67 of which, or more than 70%, are under contract with the USGA to have their players' handicaps calculated exclusively by GHIN. App. at 233-234.

Review of a motion for summary judgment is plenary. *See Radich v. Goode*, 886 F.2d 1391, 1394 (3d Cir. 1989). Summary judgment may be granted only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, Federal Rules of Civil Procedure; *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "The evidence of [Appellants] is to be believed, and all justifiable inferences are to be drawn in their favor. . . . [Appellants'] version of any disputed issue of fact thus is presumed correct. . . ." *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 456 (1992) (internal quotations marks and citations omitted).

II.

The USGA sought "an order *in limine* barring plaintiff Handicomp . . . from introducing evidence of *damages* which

Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992 (four years before Handicomp filed this case)." Supp. App. at 388 (emphasis added); *see* App. at 171. The district court granted the motion. App. at 2562-2563. Because Handicomp may not recover damages for any acts that took place before May 29, 1992, the district court ruling was correct. *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *In re Lower Lake Erie Iron Ore Antitrust Litigation*, 998 F.2d 1144, 1171-1172 (3d Cir. 1993).

III.

To establish a claim under Sherman Act § 2,[1] a plaintiff must demonstrate: (1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident. *See Eastman Kodak*, 504 U.S.

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1. Section 2 of the Sherman Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (1999).

at 481. The first step requires a plaintiff to show that a defendant has "the power to control market prices or exclude competition." *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956). The second step seeks to determine if a defendant, who possesses monopoly power, developed or abused it willfully as opposed to through business acumen. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-571 (1966). Finally, for a private plaintiff to have standing, he or she must show "antitrust injury," which is injury linked to an antitrust violation, rather than heightened competition.[2] *See Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990).

Handicomp produced evidence that the relevant market is "association-based USGA Handicap Index computation services." App. at 233 (report of experts Professor Ronald Curhan and Bruce Deal). Because only golf associations are entitled to grant USGA Handicap Indexes, they represent the entire market for USGA compliant handicap computation services. GHIN controls 72% of the market; four other

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2. Section 4 of the Clayton Act provides the basis a private plaintiff may use to sue a private defendant under § 2 of the Sherman Act:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States . . . shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee.

15 U.S.C. § 15(a) (1999).

services compete for the remaining 28%, none of which has more than 8% of the total market. App. at 214.

The Court has said that the existence of monopoly power "ordinarily may be inferred from the predominant share of the market." *Grinnell Corp.*, 384 U.S. at 571. To be sure, market share is important in determining the existence *vel non* of illegal monopoly power. *See Eastman Kodak*, 504 U.S. at 481 (finding monopoly with 80-95% of market); *Grinnell Corp.*, 384 U.S. at 571 (finding 87% market control sufficient); *International Boxing Club v. United States*, 358 U.S. 242, 249 (1959) (holding market control of 93% enough); *United State v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956) (finding 75% control monopolistic); *United States v. Aluminum Co. of America*, 148 F.2d 416, 424 (2d Cir. 1945) (holding 90% control enough).

Here, Handicomp presents evidence that GHIN controls 72% of the market, but this alone is not enough to prove monopoly power, because we must determine whether USGA excluded competition. *See Landsdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3d Cir. 1982) (noting that a court must examine whether the defendant has not only controlled prices, but also excluded competition).

> A mere showing of substantial or even dominant market share alone cannot establish market power sufficient to carry out a predatory scheme. The plaintiff must show that new rivals are barred from entering the market and show that existing competitors lack the capacity to expand their output . . . .

American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publications, Inc., 108 F.3d 1147, 1154 (9th Cir. 1997) (citations and quotations omitted); *accord Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc.*, 159 F.3d 129, 141-142 (3d Cir. 1998) ("Alleging market share alone is not sufficient to state a claim under the Sherman Act;" plaintiff must allege, among other things, "that barriers [ ] exist which prevent plaintiff's entry into [the] market[ ]").

Handicomp is unable to prove substantial barriers to entry because the astronomical reaches of computers and cyberspace form the backdrop of our new millennium. If not child's play, a skilled teen age hacker today would have no difficulty in programming a data processing system to register the rating slope of a golf course and the gross score of a golfer and produce a handicap. Handicomp's president admitted almost as much, stating that this software is "getting easier" to write, and that "somebody could sit down in a matter of three weeks, develop a product and put it on the market that would compete." App. at 1161 (Stewart Healey Dep.).

We are satisfied that there are no barriers to entry in the handicap data processing market similar to services provided by the parties before us. Absent this *sine qua non*, there is no violation of the Sherman Act.

Handicomp presented affidavits and depositions from a number of GHIN competitors who said that they felt coerced into changing their marketing and sales literature as a result of the USGA's insistence on protecting intellectual property

rights in the terms "USGA Handicap" and "USGA Handicap System." *See* App. at 2106, 2112. However, the testimony does not allege that they were treated any differently than GHIN. They were still entitled to advertise themselves as providing handicapping services to USGA associations.

We are satisfied that there was insufficient evidence presented that USGA committed any anticompetitive or exclusionary acts. We are persuaded also that the district court did not err when it ruled that claims for damages caused by acts that occurred before May 29, 1992 are barred by the statute of limitations. *See Klehr v. A.O. Smith Corp.*, 521 U.S. 179, 188 (1997). Accordingly, we conclude that the district court did not err in determining that USGA did not possess illegal monopoly power.

We have considered all arguments advanced by the parties and conclude that no further discussion is necessary.

The judgment of the district court will be affirmed.

TO THE CLERK:

Please file the foregoing opinion.

/s/ Ruggero J. Aldisert
Circuit Judge

DATED: March 22, 2000

Appendix A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5372

HANDICOMP, INC.,
A MICHIGAN CORPORATION

v.

UNITED STATES GOLF ASSOCIATION,
A DELAWARE CORPORATION

Handicomp, Inc.,

Appellant.

On Appeal from the United States District Court
for the District of New Jersey
D.C. No. 97-cv-00296
District Judge: Honorable Garrett E. Brown, Jr.

Argued March 6, 2000

Before: SCIRICA, ALITO and ALDISERT,
Circuit Judges.

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was argued on March 6, 2000.

Appendix A

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district court entered April 13, 1999, be and the same is hereby affirmed.

Costs taxed against Appellant.

Attest:

s/ [illegible]
Acting Clerk

DATED: March 22, 2000

APPENDIX B — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED AND FILED APRIL 13, 1999

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 97-0296 (GEB)

HANDICOMP, INC., a Michigan corporation,

Plaintiff,

v.

UNITED STATES GOLF ASSOCIATION,
a Delaware corporation,

Defendant.

MEMORANDUM OPINION

BROWN, *District Judge*

I. *Introduction and Background*

Presently, there are six (6) motions before this Court for consideration:

(1) Defendant, United States Golf Association's (hereinafter "Defendant" or "USGA"), *In Limine* Motion to Exclude Evidence of Predatory Pricing;

(2) Defendant's *In Limine* Motion to Exclude Evidence of Damages that are not "Antitrust Injury";

(3) Defendant's *In Limine* Motion to Bar Evidence of Damages Which Handicomp, Inc. (hereinafter "Plaintiff' or "Handicomp") Allegedly Suffered as a Result of Acts that Occurred Before May 29, 1992;

(4) Plaintiff's Cross-Motion for Partial Summary Judgment;

(5) Defendant's Motion for Summary Judgment;

(6) Defendant's *In Limine* Motion to Preclude Evidence or Argument with Respect to Handicomp's New Theories of Recovery.

In this Court's opinion, the crux of the first five (5) motions listed above, in some form or another, is that Defendant claims that Plaintiff cannot establish any of the essential elements of a Sherman Act Section 2 claim, *see* 15 U.S.C. § 2, and therefore, it is entitled to summary judgment, whereas Plaintiff claims that Defendant is not entitled to summary judgment, and further, that Plaintiff is entitled to partial summary judgment in connection with Defendant's first three *in limine* motions. Therefore, given that whether Plaintiff can establish the essential elements of a Sherman Act Section 2 claim is at the heart of almost all of these motions, this Court will consider whether Plaintiff can establish the essential elements of a Section 2 claim and, depending upon that determination, will consider the remaining *in limine* motion.

Appendix B

On May 29, 1996, Plaintiff instituted the instant litigation in the United States District Court for the Northern District of California alleging that Defendant had conspired with others to monopolize the "interstate commerce of the United States in computerized golf handicapping software and services" by establishing in 1981 the Golf Handicap and Information Network (hereinafter "GHIN"). *See* Plaintiff's Complaint for Damages and Injunctive Relief Under Antitrust Laws (hereinafter "Complaint") at ¶¶ 7 and 10(a); Plaintiff's Opposition to Defendant's Motion for Summary Judgment (hereinafter "Pl.'s Opp.") at p. 3.[1] Generally speaking, Plaintiff alleges, *inter alia*, that Defendant has attained monopoly power in the computerized golf handicapping industry in conjunction with state and regional golf associations by taking unfair competitive advantage of its power as the rule-making body for the sport of golf and as the formulator of the most widely used and recognized handicap system in the United States, the USGA Handicap System. *See* Pl.'s Opp. at pp. 3 and 20. Moreover, Plaintiff alleges that, since establishing GHIN in 1981 and thereafter operating it on a break-even basis, Defendant has acquired more than 70% of the computerized handicap computation services market for state and regional associations. *Id.* at p. 20. Based upon these basic allegations, Plaintiff claims that Defendant violated Section 2 of the Sherman Act which prohibits monopolization, attempted monopolization, or conspiracy to monopolize "any part of the trade or commerce among the several States." *See* 15 U.S.C. § 2; Complaint at ¶ 1. Therefore, Plaintiff claims that it is entitled to injunctive relief and damages under Sections 4, 12, and 16 of the

1. The matter was transferred to this Court on November 5, 1996.

Clayton Act which provide not only that a court may provide injunctive relief, but that a court may award "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." *See* 15 U.S.C. §§ 15 and 26; Complaint at ¶ 1.

On or about February 10, 1998, Defendant filed three *in limine* motions: i) Motion to Exclude Evidence of Predatory Pricing; ii) Motion to Exclude Evidence of Damages that are not "Antitrust Injury"; and iii) Motion to Bar Evidence of Damages Which Plaintiff Allegedly Suffered as a Result of Acts that Occurred Before May 29, 1992 (hereinafter referred to as "Defendant's first three *in limine* motions" or individually as appropriate). In response to Defendant's first three *in limine* motions, on or about March 5, 1998, Plaintiff filed a Cross-Motion for Partial Summary Judgment and Opposition to Defendant's Motions *In Limine* to Bar Evidence Relating to Damages Pre-Dating May 29, 1992; Predatory Pricing; and Damages that are Not Antitrust Injury (hereinafter "Pl.'s Cross-Motion"). On or about March 17, 1998, Defendant filed reply briefs on its three *in limine* motions.

Thereafter, on or about April 20, 1998, Defendant filed a motion for summary judgment (hereinafter "Def.'s Summary Judgment Motion") and also filed opposition to Plaintiff's Cross-Motion (hereinafter "Def.'s Opp. to Pl.'s Cross-Motion"). On or about May 5, 1998, Plaintiff filed its Opposition to Defendant's Motion for Summary Judgment (hereinafter "Pl.'s Opp.") and also filed a reply in support of

its Cross-Motion. On or about May 18, 1998, Defendant filed its reply in support of its motion for summary judgment (hereinafter "Def.'s Reply").

Finally, on or about May 8, 1998, Defendant filed a fourth *in limine* motion to preclude evidence or argument with respect to Plaintiff's new theories of recovery (hereinafter "Defendant's fourth *in limine* motion"). Plaintiff filed its opposition to Defendant's fourth *in limine* motion on or about May 18, 1998 and Defendant filed its reply on or about May 26, 1998.[2]

For the reasons set forth in this Memorandum Opinion, this Court grants Defendant's Motion *In Limine* to Bar Evidence of Damages Which Plaintiff Allegedly Suffered as a Result of Acts that Occurred Before May 29, 1992. This Court also grants Defendant's summary judgment motion with regards to Plaintiff's claims based on actions taken by Defendant after May 29, 1992. Given this Court's grant of Defendant's motions, this Court holds that the other motions currently pending in this matter are moot.

II. *Discussion*

A. *Summary Judgment Standard*

Summary judgment may be granted only if there is no genuine issue as to any material fact and the moving party is

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2. Oral arguments were held on all the above-listed motions on August 28, 1998. Thereafter, at the direction of this Court, on September 4, 1998, the parties submitted supplemental arguments regarding Defendants' fourth *in limine* motion.

entitled to judgment as a matter of law. Fed. R. Civ. P. 56; *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In a summary judgment motion, the non-moving party receives the benefit of all reasonable doubts and any inferences drawn from the underlying facts. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986). If the non-moving party bears the burden of proof at trial as to a dispositive issue, Federal Rule of Civil Procedure 56(e) requires the party to go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See Celotex*, 477 U.S. at 324; *Schoch v. First Fidelity Bancorporation*, 912 F.2d 654, 657 (3d Cir. 1990). Issues of material fact are genuine only "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

B. *Defendant's Summary Judgment Motion*

Defendant offers two bases in support of summary judgment. First, Defendant argues that Plaintiff cannot establish the essential elements of a claim under Section 2 of the Sherman Act. *See* Def.'s Summary Judgment Motion at pp. 9-23. Specifically, Defendant contends that Plaintiff cannot establish that Defendant engaged in any anti-competitive conduct. *Id.* at pp. 9-13. Further, Defendant contends that Plaintiff cannot establish that Defendant has achieved, or can achieve, monopoly power. *Id.* at pp. 14-19. Finally, Defendant contends that Plaintiff cannot establish that Defendant's conduct caused Plaintiff "anti-trust injury." *Id.* at pp. 19-23. Defendant also argues that all of Plaintiff's claims are barred by the applicable four-year statute of

limitations. *Id.* at pp. 23-25. *See also* 15 U.S.C. § 15b. In this regard, Defendant argues that all of the conduct which Plaintiff alleges caused it harm occurred more than a decade before Plaintiff instituted the instant litigation. *Id.* at p. 23.

In response, Plaintiff argues that Defendant has engaged in anti-competitive conduct, including abusing its governing and rule-making functions, and has taken actions which have "injur[ed] competition," including registering its service marks. *See* Pl.'s Opp. at pp. 18-32. Further, Plaintiff argues that Defendant has controlled prices and excluded the competition, and therefore, has acquired a monopoly power. *Id.* at pp. 32-36. Plaintiff also argues that Defendant has caused Plaintiff "anti-trust injury" in that Defendant's acts have caused a "decline in prices, profits and values, not shown to be attributable to other causes." *Id.* at pp. 36-38. Finally, Plaintiff argues that "[m]any of the anticompetitive acts of the USGA causing injury to Handicomp occurred within the 4 year period immediately preceding the filing of the complaint," including three specifically described events: i) the formation of the Metropolitan Amateur Golf Association (hereinafter "MAGA") in Missouri; ii) manipulation of rules of the game of golf in November 1997; and iii) Kentucky Golf Association's renewal of its GHIN contract in 1995. *Id.* at pp. 38-40.

In further support of summary judgment, Defendant argues that Plaintiff's response to Defendant's summary judgment motion implicitly concedes that "any claims based on conduct before May 29, 1992 are time-barred." *See* Def.'s Reply at pp. 5-7. This, Defendant contends, at the very least supports Defendant's motion *in limine* to exclude all evidence

of damages that Plaintiff allegedly suffered because of Defendant's acts prior to May 29, 1992, including all of the events which occurred in the 1980s, and at the very most, requires dismissal of Plaintiff's Section 2 claim on summary judgment because the post-May 29, 1992 events upon which Plaintiff relies do not support a claim under Section 2 of the Sherman Act. *Id.* at pp. 6-7. In this regard, Defendant argues that the three post-May 29, 1992 events, which Defendant alleges now constitute Plaintiff's entire case, did not amount to anti-competitive conduct and did not cause Plaintiff anti-trust injury. *Id.* at pp. 7-21. Finally, Defendant argues that, in any event, Plaintiff cannot establish that Defendant has achieved, or can achieve, monopoly power because Plaintiff cannot demonstrate the existence of substantial barriers to entry into the market, and therefore, Plaintiff cannot establish any violation of Section 2 of the Sherman Act. *Id.* at pp. 21-27.

Given the posture of the foregoing arguments, this Court will consider Defendant's statute of limitations arguments first, since these arguments raise jurisdictional considerations which this Court must be convinced are satisfied before reaching both parties' arguments regarding whether Plaintiff can establish a claim under Section 2 of the Sherman Act.

1. *Statute of Limitations*

This Court agrees that many of the facts which Plaintiff alleges in support of its damages raise serious statute of limitations concerns which this Court may not ignore. Specifically, as noted by Defendant, many of the facts alleged by Plaintiff to have caused Plaintiff damage occurred in the

1980s, however, Plaintiff did not institute the instant cause of action until May 29, 1096. *See* Def.'s Reply at p. 7. Indeed, there are numerous instances throughout Plaintiff's submissions to this Court on the various motions where Plaintiff points to actions by the Defendant in the 1980s in support of its claims for damages. For example, Plaintiff repeatedly refers to the McKinsey Study, the GHIN Feasibility Study Report, and the Easterly letter in support of its claims. *See, e.g.* Pl.'s Opp. at pp. 10-18. These various events, however, occurred well before May 29, 1992. *See* Pl.'s Opp. at pp. 18-19. Therefore, since this action was not filed until 1996, it is patently clear that any anti-trust claims based upon these events, or any alleged damages caused thereby, are barred by the applicable four year statute of limitations.

Furthermore, Plaintiff notes that "[a]t or about the same time the USGA made the decision to enter the golf handicap computation services business with GHIN, the USGA federally registered its service marks which had been unregistered for many years . . . ." *Id.* at p. 4. This "belated enforcement of its intellectual property rights [by Defendant,]" Plaintiff alleges, "was illegal because the result of doing so restrained trade." *Id.* at p. 21. However, even if such allegations were true, such actions in or about 1981, and any claims for alleged damages caused thereby, are well outside the applicable four year statute of limitations, especially in an action brought in 1996.

Similarly, Plaintiff points to the Defendant's rule changes regarding the instant computation of handicaps, revision schedules, and retention of old scores. *Id.* at pp. 25-30. It is clear to this Court, however, as indicated by

Plaintiff's very submissions, that these changes occurred in 1982, 1984, and 1985, respectively. *Id.* at pp. 25, 26, and 29. Thus, none of these rule changes, or any alleged damages caused thereby, can support Plaintiff's claim under Section 2 of the Sherman Act in 1996, as each is barred by the applicable four year statute of limitations.

Finally, Plaintiff cannot bootstrap any damages allegedly caused by these actions and any other actions taken by Defendant in the 1980s, or up to May 29, 1992 for that matter, by arguing that GHIN's presence in the market constitutes a continuing violation under Section 2 of the Sherman Act. This was made very clear in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), wherein the Supreme Court held that "[a]ntitrust law provides that, in the case of a continuing violation . . . each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again . . . . *But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.*" *Id.* at 189 (emphasis added) (internal quotation marks omitted) (citations omitted). Thus, this Court holds that even if the actions alleged by Plaintiff that occurred in the 1980s have caused Plaintiff damages, and Plaintiff can show that Defendant has acted in such a manner as to violate Section 2 of the Sherman Act within the four years before it filed its Complaint on May 29, 1996, Plaintiff cannot recover for any of the damages allegedly caused by Defendant's actions prior to May 29, 1992.

Given the foregoing, this Court holds that Plaintiff cannot rely on Defendant's conduct prior to May 29, 1992,

including the various actions taken by Defendant in the 1980s, in support of its claims for damages under Section 2 of the Sherman Act. Thus, this Court grants Defendant's Motion *In Limine* to Bar Evidence of Damages Which Plaintiff Allegedly Suffered as a Result of Acts that Occurred Before May 29, 1992.

However, Plaintiff also offers at least three distinct post-May 29, 1992 events upon which it claims it may base its action under Section 2 of the Sherman Act. Specifically, these acts include: i) the formation of the Metropolitan Amateur Golf Association (hereinafter "MAGA") in Missouri; ii) alleged manipulation of rules of the game of golf in November 1997; and iii) Kentucky Golf Association's renewal of its GHIN contract in 1995. *See* Pl.'s Opp. at pp. 38-40. Defendant contends that none of these acts support a claim under Section 2 of the Sherman Act, and therefore, Defendant is entitled to summary judgment. Thus, this Court will now address whether any of these alleged events alleged by Plaintiff support Plaintiff's claim under Section 2 of the Sherman Act.

2. *Sherman Section 2*

In order to establish a claim under Section 2 of the Sherman Act, Plaintiff must demonstrate: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident." *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992) (citing *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)). The first step of this framework has

been interpreted to require a plaintiff to show that a defendant has the power to control prices or exclude competition. *See* Def.'s Summary Judgment at pp. 7-8 n.13 (citing ABA Antitrust Section, Antitrust Law Developments 229-30 and n.3 (4th ed. 1997)). The second step of this framework has been interpreted to require a plaintiff to show anti-competitive conduct intended by a defendant to acquire or preserve this monopoly power. *Id.* Furthermore, a private plaintiff seeking damages for a violation of Section 2 of the Sherman Act must show "anti-trust injury." *Id.* Thus, in order to establish that Defendant has violated Section 2 of the Sherman Act, Plaintiff must establish: 1) anti-competitive conduct; 2) monopoly power; and 3) anti-trust injury. *See* Def.'s Summary Judgment at p. 7; Pl.'s Opp. at pp. 18, 32, and 36.[3]

This Court agrees that Plaintiff cannot establish the essential elements of a claim under Section 2 of the Sherman Act. Specifically, this Court holds that Plaintiff cannot establish that: a) Defendant has a monopoly power; and b) Plaintiff has suffered "anti-trust injury" as has been interpreted by the courts considering claims under Section 2 of the Sherman Act.[4] Therefore, this Court grants Defendant's motion for summary judgment.

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3. Indeed, besides Defendant's present summary judgment motion, nearly all of the motion practice in this matter has focused on whether Plaintiff can establish these very elements. *See, e.g.* Def.'s *in limine* motions to exclude evidence of predatory pricing and to exclude evidence of damages that are not "antitrust injury" and Pl.'s Cross-Motion.

4. With regards to the first of the three requirements under Section 2 of the Sherman Act, this Court also holds that Plaintiff (Cont'd)

Appendix B

a. **Monopoly Power**

In order to succeed on its Sherman Act Section 2 claim, Plaintiff must establish that Defendant has, or can achieve, a monopoly power in the relevant market. *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 481 (1992). Monopoly power, simply put, is "the power to control prices and exclude competition." *See Lansdale v. Philadelphia Electric Co.*, 692 F.2d 307, 311 (3d Cir. 1982) (citation omitted). With regards to monopoly power, Plaintiff argues that in the computerized handicap computation service market for golf associations, Defendant is the "dominant vendor," servicing over 70% of the market. *See* Pl.'s Cross-Motion at pp. 10-11.[5] In this regard, Plaintiff argues that

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(Cont'd)
cannot show that Defendant has engaged in anti-competitive or exclusionary conduct, This Court holds that, at most, Plaintiff has only showed that Defendant has a "relationship" with GHIN. *See* Def.'s Summary Judgment Motion at pp. 10-12 (noting the deposition testimony of Bruce Deal at p. 38 that the primary thing that Defendant did to "reduce competition in the relevant market" was "primarily the relationship between GHIN and the USGA"). However, Plaintiff has failed to show that Defendant has acted in an anti-competitive or exclusionary nature. Indeed, Plaintiff's experts have not pointed to any exclusionary or anti-competitive conduct by Defendant. *See* Def.'s Summary Judgment Motion at p. 10 (noting the deposition testimony of Dr. Ronald Curhan at p. 28-30 that he could not "point to anything that the USGA did that hurt competition"). Thus, this Court holds that Plaintiff has not established that Defendant's conduct was anti-competitive or exclusionary.

5. With regards to relevant market, there has been an admitted "battle of the experts." *See* Def.'s Summary Judgment Motion at (Cont'd)

since Defendant does not dispute that it serves a rather large segment of that market, by Defendant's "own admissions, the USGA enjoys a monopoly in the relevant market, as a matter of law." *Id.* at p. 11. Plaintiff also notes that certain individuals within the USGA predict that Defendant's growth in this market will only continue to grow. *See, e.g.* Pl.'s Cross-Motion at p. 11; Pl.'s Opp. at pp. 20, 32-34. Plaintiff further argues that when Defendant first entered the computerized handicap computation services market, there were approximately 40 entities in the business of providing such services and as of this date, "only 4 firms remain in the business of providing handicap computation services to state and regional golf associations: Handicomp, Star Plan, IDC and Sumner" and that "[o]nly one new firm has entered the market and survived in the past 12 years." *See* Pl.'s Opp. at pp. 20, 34. This, according to Plaintiff, "illustrates . . . graphically" that the Defendant "has the power, which it has exercised, to exclude competition and control prices." *Id.* at p. 36. Given this, Plaintiff argues that Defendant has acquired a monopoly power in the computerized handicap computation services market. *Id.* at pp. 33-34.

As an initial matter, Plaintiff s argument that Defendant's 72% share of the association market and Defendant's "admissions" in this regard do not establish that "the USGA enjoys a monopoly in the relevant market, as a matter of law." *See* Pl.'s Cross-Motion at p. 11. Indeed, Plaintiff cannot

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(Cont'd)

p. 2 n.5. For purposes of this Court's consideration of the present motion, this Court will assume that the relevant market at issue is the association market. *See* Def's Summary Judgment Motion at p. 2; Pl.'s Opp. at p. 9.

establish that Defendant enjoys a monopoly in the relevant market merely by showing a "substantial or even dominant market share." *See American Professional Testing Serv. v. Harcourt Brace Jovanich Legal & Professional Publs., Inc.*, 108 F.3d 1147, 1154 (9th Cir. 1997) (citation omitted). *See also Bacchus Indus. v. Arvin Indus.*, 939 F.2d 887, 894 (10th Cir. 1991) (noting that "market share alone is insufficient to establish market power") (citation omitted). Instead, Plaintiff "must show that new rivals are barred from the market and show that existing competitors lack the capacity to expand their output . . . ." *Id.* Stated differently, Plaintiff must show that there exist significant barriers to entry into the market. *See Lansdale v. Philadelphia Elec., Co.*, 692 F.2d 307, 311 (3d Cir. 1982) (noting that in determining whether a defendant has acquired a monopoly power, a court must examine whether the defendant has not only controlled prices, but also excluded competition). Plaintiff has failed to make any such showing. In fact, this Court notes that much of evidence in the record is completely to the contrary.

Specifically, both the fact and expert testimony offered by Plaintiff demonstrates that the barriers to entry into the association market are minimal and that it is getting easier for competitors to enter the market. For example, Plaintiff's marketing expert, Dr. Ronald Curhan, testified that assembling the computer systems and software necessary to calculate handicaps for associations is "within the reach of most companies." *See* Def.'s Summary Judgment Motion at p. 16 (citing deposition testimony of Dr. Curhan at pp. 75-76). Specifically, Dr. Curhan testified that

Q. Do you have any opinion how much it would cost or how long it would take to create such a system?

A. Not insurmountable in any realistic sense for various contenders in the business. It is going to be a number of man months of work . . . .

Q. Do you consider those some number of man months and logistical hassles to be a substantial barrier to entry that affects competition in the market?

A. No.

Id. (citing deposition testimony of Dr. Curhan at p. 76). Further, Handicomp's President, Stewart Healey, testified that it is "getting easier" to develop handicap computation software. *Id.* (citing deposition testimony of Healey at p. 468). In fact, Mr. Healey testified that such handicap computation software can be developed "in the matter of three weeks." *Id.* Thus, the very testimony of Plaintiff's own officers and experts contradicts Plaintiff's position that "the barriers into this market are nearly insurmountable." *See* Pl.'s Opp. at p. 34. However, this Court need not rely solely upon this testimony in order to find that Plaintiff cannot establish that the barriers to entry into the association market are significant.

Instead, this Court also notes that there are several examples of entry into the golf association market which undermine Plaintiff's position that barriers to entry into the

association market are "insurmountable." First, this Court notes that Plaintiff has not been excluded from the computerized handicap computation services market for associations. *See* Def.'s Summary Judgment Motion at p. 17 (noting that in 1994 Plaintiff provided "network" software for the Golf Association of Michigan, one of Plaintiff's clients). Further, a former President of Handicomp, and a brother of Handicomp's current President, left Handicomp in the mid-1990s and formed Cosmos, a competitor of both Plaintiff and Defendant in the handicap computation services market. *See* Def.'s Summary Judgment Motion at pp. 17-18. Furthermore, Sumner, Inc., which entered the computerized handicap computation services market in 1985, has enjoyed growth and success in the market. Indeed, another of Plaintiff's experts, Bruce Deal, noted that Sumner has "enjoyed fairly significant growth in the independent club market and has a number of associations now . . . ." *See* Def.'s Opp. to Pl.'s Cross-Motion at pp. 12-13, n.11 (citing the deposition testimony of Deal at p. 182). Moreover, Star Plan Data Systems, which entered the computerized handicap computation services market at about the same time as GHIN, provides handicap computation services to the Wisconsin and Iowa State Golf Associations and competes for the business of golf associations in Kentucky, Michigan, and the Chicago District. *Id.* at p. 13, n.12 (citing the deposition testimony of William Kravit, President and Owner of Star Plan at pp. 5, 6, and 26-29). As with Plaintiff's fact and expert testimony, these instances of entry into the computerized handicap computation services market by vendors competing with GHIN, including Plaintiff, undermine Plaintiff's argument that there are "insurmountable" barriers to entry into the market. *See Columbia Metal Culvert Co. v. Kaiser*

Aluminum & Chemical Corp., 579 F.2d 10, 27 n.11 (3d Cir.) (noting that "the existence of competitors . . . [is] evidence of countervailing power which would preclude monopolization"), *cert. denied*, 439 U.S. 876 (1978).

With regards to the three distinct post-May 29, 1992 events upon which Plaintiff claims it may base its action under Section 2 of the Sherman Act, specifically: i) the formation of the Metropolitan Amateur Golf Association in Missouri; ii) manipulation of rules of the game of golf in November 1997; and iii) Kentucky Golf Association's renewal of its GHIN contract in 1995, this Court holds that these events do not establish that Defendant has acquired a monopoly power in the relevant association market. Specifically, with regards to the Kentucky Golf Association's renewal of its GHIN contract in 1995, Plaintiff has offered no evidence that Defendant did anything to control prices or exclude competition. Indeed, it appears uncontroverted that the complete opposite occurred. In 1995, the Kentucky Golf Association received written proposals and oral presentations regarding computerized handicap computation services from five vendors: GHIN, Handicomp, Sumner, IDC, and Star Plan. *See* Def.'s Reply at p. 15. Plaintiff has not offered any evidence to this Court that Defendant did anything to exclude these vendors from competing for the Kentucky Golf Association's business.[6] Indeed, as noted above, "the

6. While Plaintiff points to a letter from Mr. Bobby Owens, USGA Sectional Affairs Committee and Handicap Procedures Committee member and former Kentucky Golf Association official, to the Kentucky Golf Association offering an opinion against switching from GHIN, Plaintiff has offered no evidence that any (Cont'd)

existence of competitors . . . [is] evidence of countervailing power which would preclude monopolization." *Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp.*, 579 F.2d 20, 27 n.11 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978). Therefore, this Court holds that Plaintiff's reliance on the Kentucky Golf Association's renewal of its GHIN contract in 1995 does not support Plaintiff's contention that Defendant did anything to control prices or exclude competition in violation of Section 2 of the Sherman Act.

Further, with regards to the formation of the Metropolitan Amateur Golf Association in Missouri, this Court holds that nothing has been offered by Plaintiff to support the conclusion that Defendant excluded Plaintiff from offering its computerized handicap computation services to MAGA or that Defendant did anything to control prices after the formation of MAGA. Therefore, this Court holds that Plaintiff's reliance on the formation of the Metropolitan Amateur Golf Association in Missouri does not support Plaintiff's contention that Defendant has acquired a monopoly power in violation of Section 2 of the Sherman Act.

(Cont'd)
director of the Kentucky Golf Association favored switching to Handicomp and that anything Defendant did, including Mr. Owens' letter, changed this. Therefore, it is clear that Plaintiff, as well as other vendors, was free to compete with Defendant and to convince the directors of the Association of the benefits of its product, and Plaintiff has shown nothing Defendant did to exclude Plaintiff, or others, from doing this.

Finally, with regards to Plaintiff's allegation that Defendant manipulated the rules of the game of golf in November 1997, this Court holds that nothing offered by Plaintiff in this respect establishes that this action, if it did occur, excluded Plaintiff from the association market or controlled prices in any fashion. Instead, Plaintiff cannot offer a single instance in which it was not able to make the necessary changes in its software to comply with a rule change. Indeed, the evidence offered by Handicomp itself belies the Plaintiff's contention that any rule changes by Defendant have excluded Plaintiff from the association market. *See* Def.'s Reply at p. 13 (noting that James Healy's certification at ¶ 44 states that Handicomp "compl[ies] in all respects" with the USGA Handicap System and that Stewart Healy stated in his deposition at p. 420 that he does not know of any change in the Handicap System that Handicomp was unable to implement in a timely manner). Therefore, this Court holds that Plaintiff's reliance on the manipulation of rules of the game of golf in November 1997 does not support Plaintiff's contention that Defendant did anything to control prices or exclude competition in violation of Section 2 of the Sherman Act.

Given the foregoing, this Court holds that Plaintiff cannot demonstrate that Defendant has acquired a monopoly power. Therefore, this Court grants Defendant's motion for summary judgment.

b. **Anti-trust Injury**

Further, in order to succeed on its Sherman Act Section 2 claim, Plaintiff must establish that as a result of Defendant's

conduct, Plaintiff has suffered "anti-trust injury." *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). "Anti-trust injury" is

> injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of the anticompetitive acts made possible by the violation.

Id. Such injury, however, may not be based upon damages that resulted from heightened competition. *Id.* at 488, 490 (noting that trial court's award of "additional income [that plaintiff] would have realized" had the centers acquired by defendant gone out of business was improper, because "[t]he antitrust laws . . . were enacted for 'the protection of competition, not competitors . . . .' ") (citation omitted)). *See also Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 114-117 (1986) (holding that loss of profits due to possible price competition following a merger not compensable under anti-trust laws). Indeed, it is well settled in this Circuit that "because 'antitrust laws aim to protect competition, not competitors, [a court] must analyze the antitrust injury question from the viewpoint of the consumer.' " *Mathews v. Lancaster General Hospital*, 87 F.3d 624, 641 (3d Cir. 1996) (citation omitted). Defendant's position, both on its Motion *In Limine* to Exclude Evidence of Damages that are not "Antitrust Injury" and its summary judgment motion, is that Plaintiff's damages are based upon "competition with GHIN" which allegedly prevented Plaintiff from raising its prices by 25%, and therefore, when viewed from the standpoint of

the consumer, are not "anti-trust injury." *See* Def's Motion *In Limine* to Exclude Evidence of Damages that are not "Antitrust Injury" at p. 6; Def.'s Summary Judgment Motion at p. 20. This Court agrees.

The center of Plaintiff s damage claim is that Handicomp could have charged at least 25% more had GHIN never entered the market. *See* Plaintiff's Initial Disclosures at p. 2. No matter how Plaintiff attempts to phrase it now in opposition to summary judgment, this is clear from the very testimony offered by Plaintiff's experts. For example, Dr. Charles Upton, one of Plaintiff's experts stated

> [a]s a practical matter, [Handicomp's] profits would have been above [what they actually were, if GHIN had not existed], for the market pressures exerted by the GHIN system served to keep prices down in the handicapping industry. Absent this [GHIN] system, prices — and hence profit margins — would almost certainly have been higher. Handicomp estimates that the price would have been at least 25 percent higher.

See Report of Dr. Charles Upton at p. 6. In effect, Plaintiff is alleging that it lost profits because of GHIN's competition with it. This simply is not "anti-trust injury" as the courts have defined it. *See, e.g. Sanjuan v. American Board of Psychiatry and Neurology, Inc.*, 40 F.3d 247, 251-52 (7th Cir. 1995) (noting that "[t]he claim that a practice reduces (particular) producers' incomes has nothing to do with antitrust laws, which are designed to drive producers' prices down rather than up. Indeed, it does not even state an antitrust

injury."), *cert. denied*, 516 U.S. 1159 (1996) (citation omitted). It is this Court's opinion that Plaintiff's damage claim is based upon "loss from continued competition" with GHIN and to allow Plaintiff to recover damages for such competition would turn anti-trust law on its head to the detriment of the consumer. *See Ansell Inc. v. Schmid Labs., Inc.*, 757 F. Supp. 467, 485 (D.N.J.), *aff'd without opinion*, 941 F.2d 1200 (3d Cir. 1991) (holding that plaintiff's alleged loss of sales due to proposed merger and resultant increased size, national recognition, and "marketing clout," not compensable as "anti-trust injury"). Therefore, this Court holds that Plaintiff cannot demonstrate "anti-trust injury."[7]

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7. With regards to the three distinct post-May 29, 1992 events upon which Plaintiff claims it may base its action under Section 2 of the Sherman Act, specifically: i) the formation of the Metropolitan Amateur Golf Association in Missouri; ii) alleged manipulation of rules of the game of golf in November 1997; and iii) Kentucky Golf Association's renewal of its GHIN contract in 1995, this Court holds that to the extent Plaintiff is merely claiming that it suffered from competition with Defendant, these events do not establish that Plaintiff has suffered "antitrust injury." This is applicable with regards to the Kentucky Golf Association's renewal of its GHIN contract in 1995 and the formation of the Metropolitan Amateur Golf Association in Missouri.

Further, with regards to Plaintiff's allegation that Defendant manipulated the rules of the game of golf in November 1997, this Court holds that nothing offered by Plaintiff in this respect establishes that this action, if it did occur, caused Plaintiff to suffer "anti-trust injury." Instead, the testimony offered by Plaintiff clearly shows that there is not a single instance in which Handicomp could not comply with a rule change, and therefore, was injured.

(Cont'd)

Given the foregoing, this Court holds that Plaintiff cannot demonstrate that it has suffered "anti-trust injury" as a result of Defendant's conduct. Therefore, this Court grants Defendant's motion for summary judgment.[8]

(Cont'd)

Therefore, this Court holds that Plaintiff's reliance on these three distinct post-May 29, 1992 events does not support Plaintiff's contention that Defendant's actions resulted in "anti-trust injury" in violation of Section 2 of the Sherman Act.

8. In connection with Plaintiff's opposition to Defendant's summary judgment motion on the essential elements of a Sherman Act Section 2 claim, Plaintiff has submitted certifications of two of its experts, Bruce Deal and Dr. Ronald Curhan. *See* Certifications of Ronald C. Curhan and Bruce Deal dated April 30, 1998. Initially, it appears that Plaintiff makes no reference to either of these Certifications in opposition to Defendant's summary judgment motion, however, Dr. Curhan's Certification does indicate that it is being submitted "to clear up the record" because "[s]everal statement attributed to me by defendant in its Memorandum are taken out of context." *See* Curhan April 30, 1998 Certification at ¶ 2. This Court is of the opinion that these Certifications do nothing of the sort. Instead, both Certifications clearly contradict both experts' earlier deposition testimony. *Compare, e.g.* Curhan Deposition Testimony at p. 76 (stating that he did not consider "some number of man months and logistical hassles to be a substantial barrier to entry that affects competition in the market") *with* Curhan April 30, 1998 Certification at ¶ 4 (stating that there are "insurmountable barriers to entry into the market due to the awesome power that the USGA has in the handicap service marketplace by virtue of its position as the governing body for golf and its relationships . . . with state and regional golf associations"); Deal Deposition Testimony at p. 63 (stating that Defendant has been successful in the market in some part because "most [GHIN] customers are fairly satisfied with the

(Cont'd)

III. *Conclusion*

For the foregoing reasons, this Court grants Defendant's Motion *In Limine* to Bar Evidence of Damages Which Plaintiff Allegedly Suffered as a Result of Acts that Occurred Before May 29, 1992. This Court also grants Defendant's summary judgment motion as to Plaintiff's Sherman Act Section 2 claims based on actions taken by Defendant after May 29, 1992. Given this Court's grant of Defendant's

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(Cont'd)
quality of their service") *with* Deal April 30, 1998 Certification at ¶ 5 (stating that "[t]he linkage of the sport's rule-making authority to its handicap service customers creates nearly insurmountable barriers to entry in this market . . . and is the primary reason why no new vendors have entered the market in the past ten years and why the number of vendors has declined dramatically since GHIN's entry"). Initially, this Court notes that when "the party moving for summary judgment does so on the basis of a deposition of the nonmoving party that contains matters that would entitle the movant to judgment, but the nonmoving party then introduces a later-made affidavit contradicting those statements," this Court may disregard the later-made affidavit and properly grant summary judgment. *See Howell v. Sam's Club #8160/Wal-Mart*, 959 F. Supp. 260, 264 n.7 (E.D. Pa. 1997), *aff'd without opinion*, 141 F.3d 1153 (1998) (noting that "[w]hile the court must draw all justifiable inferences in favor of the nonmoving party, the court is not required to turn a blind eye to contradictions in a party's submissions to the court.") (citing *Martin v. Merrell Dow Pharmaceuticals, Inc.*, 851 F.2d 703, 706 (3d Cir. 1988)). Although a clarifying or correcting affidavit may be appropriate, even though it contradicts prior deposition testimony, where "the witness was confused at the earlier deposition or for some other reason misspoke," this Court has not considered the contradictory April 30, 1998 Certifications as no such confusion has been shown here. *See Martin*, 851 F.3d at 705.

motions, this Court holds that the other motions currently pending in this matter are moot. An appropriate form of Order is filed herewith.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

Appendix B

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 97-0296 (GEB)

HANDICOMP, INC., a Michigan corporation,

Plaintiff,

v.

UNITED STATES GOLF ASSOCIATION,
a Delaware corporation,

Defendant.

ORDER

This matter having come before this Court on:

(1) Defendant, United States Golf Association's, *In Limine* Motion to Exclude Evidence of Predatory Pricing;

(2) Defendant's *In Limine* Motion to Exclude Evidence of Damages that are not "Antitrust Injury";

(3) Defendant's *In Limine* Motion to Bar Evidence of Damages Which Handicomp, Inc. Allegedly Suffered as a Result of Acts that Occurred Before May 29, 1992;

(4) Plaintiff's Cross-Motion for Partial Summary Judgment;

(5) Defendant's Motion for Summary Judgment; and

(6) Defendant's *In Limine* Motion to Preclude Evidence or Argument with Respect to Handicomp's New Theories of Recovery;

and this Court having considered the parties' submissions and oral argument on August 28, 1998; for the reasons set forth in the Memorandum Opinion filed this date in the above-captioned action; and for good cause shown

IT IS on this 12th day of April, 1999;

ORDERED that Defendant's *In Limine* Motion to Bar Evidence of Damages Which Handicomp, Inc. Allegedly Suffered as a Result of Acts that Occurred Before May 29, 1992 be and hereby is GRANTED; and

IT IS FURTHER ORDERED that Defendant's summary judgment motion be and hereby is GRANTED as to Plaintiff's claims under the Sherman Act Section 2 based upon allegations regarding Defendant's conduct after May 29, 1992; and

IT IS FURTHER ORDERED that, given this Court's grant of Defendant's summary judgment motion, all other motions currently pending in this matter are MOOT.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR.,
U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 5, 2000

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 99-5372

HANDICOMP, INC.,
A MICHIGAN CORPORATION

v.

UNITED STATES GOLF ASSOCIATION,
A DELAWARE CORPORATION

Handicomp, Inc.,

Appellant

(D.C. Civ. No. 97-cv-00296)

SUR PETITION FOR REHEARING

Present: BECKER, *Chief Judge*,
SLOVITER, MANSMANN, GREENBERG, SCIRICA,
NYGAARD, ALITO, ROTH, McKEE, BARRY
and ALDISERT*, *Circuit Judges*

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* As to panel rehearing only.

Appendix C

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ [illegible]
Circuit Judge

Dated: MAY -5 2000

APPENDIX D — RELEVANT STATUTES

15 U.S.C. § 2

§ 2. Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

* * *

15 U.S.C. § 15(a)

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. The court may award under this section, pursuant to a motion by such person promptly made, simple interest on actual damages for the

period beginning on the date of service of such person's pleading setting forth a claim under the antitrust laws and ending on the date of judgment, or for any shorter period therein, if the court finds that the award of such interest for such period is just in the circumstances. In determining whether an award of interest under this section for any period is just in the circumstances, the court shall consider only —

> (1) whether such person or the opposing party, or either party's representative, made motions or asserted claims or defenses so lacking in merit as to show that such party or representative acted intentionally for delay, or otherwise acted in bad faith;
>
> (2) whether, in the course of the action involved, such person or the opposing party, or either party's representative, violated any applicable rule, statute, or court order providing for sanctions for dilatory behavior or otherwise providing for expeditious proceedings; and
>
> (3) whether such person or the opposing party, or either party's representative, engaged in conduct primarily for the purpose of delaying the litigation or increasing the cost thereof.

* * *

Appendix D

15 U.S.C. § 26

§ 26. Injunctive relief for private parties; exception; costs

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit for injunctive relief against any common carrier subject to the jurisdiction of the Surface Transportation Board under subtitle IV of Title 49. In any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.

* * * *

(2)

No. 00-231

Supreme Court, U.S.
FILED
SEP 8 2000
CLERK

In the Supreme Court of the United States

HANDICOMP, INC.,
Petitioner,
v.
UNITED STATES GOLF ASSOCIATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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25 pp

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the four-year statute of limitations bars Handicomp's claims for damages caused by acts that occurred more than four years before Handicomp filed suit.

2. Whether the court of appeals erred in affirming summary judgment on Handicomp's monopolization claim on the ground that Handicomp failed to present sufficient evidence of substantial barriers to entry.

3. Whether the court of appeals erred in affirming summary judgment on Handicomp's monopolization claim on the ground that Handicomp failed to present sufficient evidence "that USGA committed any anticompetitive or exclusionary acts."

4. Whether the judgment below is correct on the alternative ground (which the court of appeals did not address) that Handicomp failed to present sufficient evidence of antitrust injury.

Rule 29.6 Statement

Respondent United States Golf Association is a non-profit association of golf clubs and golf courses. It has no parent company, and no public company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

Rule 29.6 Statement ii

Table of Authorities iv

STATEMENT 1

1. *Statute of limitations* 2
2. *Monopoly power* 5
3. *Anticompetitive conduct* 7
4. *Antitrust injury* 9

REASONS FOR DENYING THE PETITION 10

CONCLUSION 19

TABLE OF AUTHORITIES

Page(s)

Cases

Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988) 16, 17

American Society of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. 556 (1982) 16, 17

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328 (1990) 18

Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977) 18

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104 (1986) 18

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) .. 4, 12, 13

Reazin v. Blue Cross and Blue Shield, 899 F.2d 951 (10th Cir. 1990) 11, 14-16

Rotella v. Wood, 120 S. Ct. 1075 (2000) 12

SanJuan v. American Board of Psychiatry & Neurology, 40 F.3d 247 (7th Cir. 1995) 18

Statutes

Sherman Act, §1 17

Sherman Act, §2 ..... 1, 17

TABLE OF AUTHORITIES – Continued

Page(s)

Other Authorities

Areeda & Turner, *Antitrust Law* ¶ 505 16

BRIEF FOR THE RESPONDENT IN OPPOSITION

The unpublished decisions below involved the straightforward application of settled antitrust law to plaintiff's evidence. There is no split among the circuits. The petition for certiorari therefore should be denied.

STATEMENT

Respondent United States Golf Association ("USGA") is a non-profit association of golf clubs and golf courses. Among its other activities, the USGA promulgates the Rules of Golf and the USGA Handicap System, and conducts 13 annual golf championships (including the U.S. Open). A-1421-2.[1]

The USGA Handicap System is a set of rules and procedures for calculating a golfer's USGA Handicap Index ("handicap"). Handicaps, which are issued to golfers by golf clubs or golf associations, enable golfers of differing abilities to compete against each other. Handicap computation is a simple arithmetic process, involving application of a mathematical formula to a golfer's scores.

Handicomp and the USGA offer competing data processing services for computing golfers' handicaps. Handicomp has offered such a service since 1968; the USGA began offering its handicap computation service (known as Golf Handicap and Information Network ("GHIN")) in 1981. Pet. App. 2a-3a; 20a. Handicomp's complaint, which was filed on May 29, 1996, alleged that, "beginning at least in 1980," the USGA monopolized the market for "handicap computer software and services" in violation of § 2 of the Sherman Act. A-17.

After discovery, the district court granted summary judgment in favor of the USGA on four independent grounds,

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[1] "A-___" refers to the Appendix, and "SA-___" refers to the Supplemental Appendix, filed in the court of appeals.

each of which was sufficient to support the judgment. The district court held that (1) the statute of limitations barred Handicomp's claims for damages caused by acts that occurred before May 29, 1992 (Pet. App. 19a-22a); (2) Handicomp's evidence did not raise a genuine issue as to the existence of monopoly power (*id.* at 26a-29a); (3) Handicomp's evidence did not raise a genuine issue as to the USGA's alleged anti-competitive or exclusionary conduct (*id.* at 23a-24a n.4); and (4) Handicomp had not suffered antitrust injury (*id.* at 31a-36a).

A unanimous panel of the Third Circuit affirmed in a short, unpublished opinion. The panel affirmed each of the district court's first three holdings and did not reach the fourth.[2] The court, without dissent, denied rehearing and rehearing en banc.

Handicomp's certiorari petition asks this Court to grant review on all four issues, because the judgment below cannot be reversed unless Handicomp prevails on all of them. The following sections briefly review the facts, and the proceedings below, on each of the four issues that Handicomp has raised in the petition.

1. Statute of limitations. Handicomp's claim is based almost entirely upon events that occurred in the 1980s, more than four years before Handicomp filed its 1996 complaint. See Pet. App. 19a-22a. In fact, virtually all of the events described in the petition allegedly occurred in the 1980s.[3]

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[2] The petition states, erroneously, that the Third Circuit "held . . . that Handicomp had not demonstrated antitrust injury." Petition *i*, Questions Presented, no. 3. In fact, the Third Circuit did not even address the issue of antitrust injury.

[3] Handicomp indisputably knew of its alleged antitrust claims in the (continued...)

All of Handicomp's claimed damages allegedly were caused by the USGA's conduct in the 1980s. The petition admits that Handicomp "did not ascribe particular damages to" any of the USGA's challenged actions within the limitations period. Pet. *i* (Questions Presented, no. 4). Handicomp's opening brief in the court of appeals likewise stated (at 42) that "no particular damage could be attributed" to the USGA's conduct after May 29, 1992.

In May 1997, the magistrate judge ruled that documents created before 1990 generally were not relevant or discoverable, because Handicomp's claims for damages caused by events that occurred before May 29, 1992 are barred by the four-year statute of limitations. SA 49-50. Handicomp did not appeal that important ruling, which governed all discovery.

In February 1998, the USGA moved for an order *in limine* barring Handicomp "from introducing evidence of damages which Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992 (four years before Handicomp filed this case)." SA-388. Handicomp's opposing brief was revealing, and dispositive, on this point. Handicomp's *only argument* on the statute of limitations issue was the entirely new

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[3] (...continued)
mid-1980s, more than ten years before it filed this action. A-1095-15-1095-21. A 1983 Handicomp memorandum discussed filing an antitrust "class action" against the USGA. James Healey dep., A-590-593. The minutes of a 1984 meeting of Handicomp's Board state that "the actions taken by the USGA to date would appear to reflect an intention to monopolize handicap computations throughout the country." A-1369. James Healey (Handicomp's founder and chairman) complained about GHIN's "monopoly" to the Federal Trade Commission in 1985, and to his congressman in 1989. A-902-03; A-1395-96.

contention that the statute of limitations was tolled by the USGA's alleged "fraudulent concealment" of facts purportedly supporting Handicomp's claims. SA-430-32. Handicomp *did not dispute* that, in the absence of fraudulent concealment, its claim for damages allegedly caused by pre-1992 conduct is time-barred, and evidence of those damages is inadmissible.

Handicomp then attempted to avoid the effect of the statute of limitations by moving for leave to amend the complaint to add allegations of fraudulent concealment. A-512-28. The magistrate judge denied that motion, and the district court affirmed, on three independent grounds: undue delay, prejudice, and futility. A-1073-93; SA-114-15, SA-156-57, SA-164-66.

After rejecting Handicomp's motion for leave to amend the complaint, the district court granted the USGA's motion *in limine* to bar evidence of damages that Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992. The district court held:

> "Plaintiff cannot bootstrap any damages allegedly caused by these actions and any other actions taken by Defendant in the 1980s, or up to May 29, 1992 for that matter, by arguing that GHIN's presence in the market constitutes a continuing violation of Section 2 of the Sherman Act. This was made very clear in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997), wherein the Supreme Court held that '[a]ntitrust law provides that, in the case of a continuing violation . . . each overt act that is part of the violation and that injures the plaintiff . . . starts the statutory period running again . . . . *But the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period.*'"

Pet. App. 21a (ellipses and emphasis added by the district court).

The court of appeals affirmed on this issue in a single paragraph, concluding that, "[b]ecause Handicomp may not recover damages for any acts that took place before May 29, 1992, the district court ruling was correct." Pet. App. 5a. Because Handicomp did not claim any other damages, this decision was dispositive of the entire case.

2. Monopoly power. Handicomp's monopolization claim has another fundamental flaw: the allegedly monopolized product market includes all computer software for computing golf handicaps,[4] and even Handicomp admits that "it is relatively easy to write a software program that can calculate a handicap." Pet. 17. Therefore, as both of the lower courts concluded, entry into the relevant market is easy. And as those courts held (and as Handicomp does not deny), ease of entry defeats a monopolization claim as a matter of law. Pet. App. 7a-8a; Pet. App. 25a-26a.

There is abundant evidence in the record that entry into the relevant market is easy, and that entry has occurred. Handicomp's president admitted that handicap computation software is "getting easier to write," and that "somebody could sit down in a matter of three weeks, develop a product and put it on the market that would compete." Stewart Healey dep., A-1161. One hundred different companies now offer such software in Florida alone. Hargis dep., SA-479. Handicomp's expert Curhan agreed that it is "not inordinately difficult" to create handicap computation software that will "satisfy [a golf] association." Curhan dep., A-1101. Curhan also admitted that

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[4] Such software is within the relevant product market defined in the complaint ("handicap computer software and services"), A-17, and Handicomp's expert witnesses and fact witnesses admitted that handicap computation software competes against GHIN's services. Hargis dep., SA-479; Haynie dep., A-1349-50; Deal dep., A-1219-21.

the time and expense involved in creating a marketable handicap computation system for golf associations is **not "a substantial barrier to entry** that affects competition in the market." *Id.*, A-1115 (emphasis added). Indeed, Handicomp's brief in the court of appeals stated that "Handicomp concedes that it is not relatively difficult to develop such software." Br. 47.[5]

Moreover, as the district court determined, there are many examples of new entry into the business of computing handicaps for golf associations. Pet. App. 27a-29a. These examples, and many others in the record, belie Handicomp's assertion (Pet. 18) that there has been no new entry since 1986.[6]

After the USGA moved for summary judgment, Handicomp had its experts submit certifications in which they opined that

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[5] Handicomp asserts repeatedly (*e.g.* Pet. 5, 9, 11, 13) that GHIN's service was overpriced and inferior to Handicomp's service, and that this "fact" was "acknowledged even by associations using GHIN" (Pet. 5). However, Handicomp cites only two isolated criticisms of GHIN (both from the Kentucky Golf Association, which renewed its GHIN contract in 1995 after competitive bidding that included presentations by five competing providers). Other evidence in the record, including customer surveys, established that "61% of GHIN users consider GHIN to be priced about right," "84% of GHIN clubs rate GHIN's overall service as either excellent or outstanding," and "GHIN users see GHIN software as being substantially better than competing services."A-362-63. Handicomp's experts did not dispute these facts. To the contrary, Handicomp's expert Deal acknowledged the relatively high level of customer satisfaction with GHIN as one reason why Handicomp was unable to expand its business. A-1217.

[6] For example, when the Southern California Golf Association solicited bids for its handicap computation service contract in 1990, it received thirteen bids — including *nine* bids from computer service companies that had never previously provided handicap computation services to golf associations. A-1262-82.

the USGA somehow had created "insurmountable barriers to entry." The district court rejected those certifications, holding that they "clearly contradict both experts' earlier deposition testimony." Pet. App. 35a n.8. Handicomp now relies heavily on the same certifications (*e.g.*, Pet. 4-5, 21 n.3), without informing the Court that the district court excluded that evidence.

The court of appeals affirmed the district court's conclusion that Handicomp had failed to prove substantial barriers to entry, which the court of appeals called the "*sine qua non*" of a monopolization case. The panel observed that:

> "Handicomp is unable to prove substantial barriers to entry because the astronomical reaches of computers and cyberspace form the backdrop of our new millennium. If not child's play, a skilled teen age hacker today would have no difficulty in programing a data processing system to register the rating slope of a golf course and the gross score of a golfer and produce a handicap. Handicomp's president admitted almost as much, stating that this software is 'getting easier' to write, and that 'somebody could sit down in a matter of three weeks, develop a product and put it on the market that would compete.'" Pet. App. 8a, quoting Stewart Healey deposition.

3. Anticompetitive conduct. As a third alternative basis for affirming the judgment, the court of appeals held that "there was insufficient evidence presented that USGA committed any anti-competitive or exclusionary acts." Pet. App. 9a. That conclusion aptly summarized years of litigation in which it became apparent that Handicomp had no evidence that the USGA ever did anything that reduced competition, excluded a competitor, or caused Handicomp to suffer antitrust injury.

Handicomp's liability experts, Curhan and Deal, candidly admitted that they could not identify any anticompetitive conduct by the USGA. Curhan testified as follows:

> "Q. Has the USGA done something to reduce competition in the market for handicap computation services that you have defined?
>
> A. Well, I've looked hard in what I have to find such evidence, obviously that is an assignment that I took on with the case. And I cannot come back to you with chapter and verse. . . .
>
> Q. [C]an you point to anything that the USGA did that hurt competition?
>
> A. No, I cannot point to it."

Curhan dep., A-1103-05.

Deal was similarly candid, admitting that the only anticompetitive conduct which he could identify is the USGA's "relationship" with GHIN — *i.e.*, the mere fact that GHIN is a service offered by the USGA. Deal dep., A-1208-09. Deal also admitted that the USGA has not done anything to create barriers to entry, "other than [to] have a relationship with GHIN." A-1206. Deal could not identify any situation in which the USGA used its rule-making authority to disadvantage its competitors. A-1206-07. And, as the Deal/Curhan expert report conceded, "[t]here is no evidence of associations being directly pressured or threatened by the USGA to select GHIN as their vendor." A-216.

Handicomp's principals and its expert witness Curhan also admitted that they could not identify anything that the USGA ever did that hurt Handicomp. For example, Curhan testified:

"Q. Do you know of anything that the USGA has done that hurt Handicomp?

A. No."

A-1108; see also A-1106-1107 (conceding that Curhan could not "point to any business that Handicomp lost as a result of anything that the USGA did"). Handicomp's principals made similar admissions. For example, Patricia Healey, who has been active in Handicomp's business for 30 years, testified:

"Q. Mrs. Healey, can you give me any example of anything the USGA ever did that hurt Handicomp?

A. I cannot."

A-1140. *Accord*, Lisa Healey Postma dep., A-1164 ("Q. Has Handicomp been damaged by anything the USGA has ever done? A. I have no personal knowledge on that").

Based in part on these admissions, and after a detailed review of Handicomp's evidence, the district court held that "Plaintiff cannot show that Defendant has engaged in anti-competitive or exclusionary conduct." Pet. App. 23a-24a n.4. The court held specifically that there is no evidence that the USGA's allegedly improper "manipulation of the rules of the game of golf" has "excluded Plaintiff from the association market or controlled prices in any fashion." *Id.* p. 31a. The court of appeals summarily affirmed on this issue. Pet. App. 9a.

4. Antitrust injury. The district court's fourth alternative basis for granting summary judgment was that Handicomp could not prove antitrust injury. Although the court of appeals did not reach this issue (because it had affirmed the judgment on three other grounds), Handicomp's damage theory demonstrates the fundamental failure of its antitrust claims.

From the outset, Handicomp's damage theory has been that it is entitled to recover the profits that it would have made "if GHIN didn't exist." Handicomp's Computation of Damages, A-198-15. Handicomp's damages expert, Upton, based his damage calculation on the sales that Handicomp "lost to GHIN," because of "competition from GHIN." *Id.*, A-1287-1288.

Handicomp also asserted that its profits were lower than they otherwise would have been because competition from GHIN forced Handicomp to charge lower prices. Handicomp's damage computation states, "If GHIN didn't exist, Handicomp prices would be 25% higher," and Handicomp computed its alleged damages on the basis of the revenue that it would have received if its prices had been 25% higher. A-198-15.

The district court held that Handicomp's claim that it would have been able to charge higher prices and earn higher profits if its competitor "didn't exist" does not constitute a claim of antitrust injury (Pet. App. 33a-34a):

> "In effect, Plaintiff is alleging that it lost profits because of GHIN's competition with it. This simply is not 'anti-trust injury' as the courts have defined it. . . . It is this Court's opinion that Plaintiff's damage claim is based upon 'loss from continued competition' with GHIN and to allow Plaintiff to recover damages for such competition would turn anti-trust law on its head to the detriment of the consumer."

REASONS FOR DENYING THE PETITION

This case does not raise any new, important or unsettled issue of federal law. On three of the four issues that Handicomp has raised in the petition (statute of limitations, anticompetitive conduct, and antitrust injury), Handicomp merely argues that the lower courts erred in applying admittedly settled law to the

evidence. Indeed, the petition states expressly that the law applicable to this case is clear from "a veritable laundry list of antitrust decisions issued by the Supreme Court, beginning with the *Standard Oil* case." Pet. 13. Therefore, there is no need for this Court to grant review in order to clarify the law.

On the remaining issue (the definition of barriers to entry), the asserted conflict between the Third Circuit and the Tenth Circuit is both illusory and immaterial to the outcome of this case. The Third Circuit did not — as the petition contends — adopt any restrictive definition of a barrier to entry; it merely affirmed the district court's fact-bound conclusion that Handicomp had failed to raise a genuine issue of material fact as to the existence of *any* barrier to entry. The USGA never argued for a narrow definition of a barrier to entry, and Handicomp never argued for a broad definition. In fact, Handicomp never previously cited the Tenth Circuit decision upon which it now relies (*Reazin* v. *Blue Cross and Blue Shield*, 899 F.2d 951 (10th Cir.), cert. denied, 497 U.S. 1005 (1990)) for the definition of a barrier to entry, because there was never an issue in this case regarding the definition of a barrier to entry. Thus there is no conflict between the unreported decision below and the Tenth Circuit's decision in *Reazin*. (See point 4 below).

Nor is there any conflict between the decision below and any decision of this Court. The decision below involved a straightforward application of settled law to fact, leading to an entirely predictable result.

1. One overarching reason to deny review in this case is that the decision below is supported by four independent grounds, each of which is sufficient to warrant affirmance of the judgment, but **none of which is necessary** to the result. Therefore, a decision to review and reverse the court of appeals on any one issue (or even two or three) would amount to an

advisory opinion, because the decision below would still be correct for the other reason(s) articulated by the courts below.

The clearest example is the statute of limitations issue. As discussed above (at p. 3-4), Handicomp admits that if the lower courts' application of the statute of limitations was correct, all of its claims are time-barred. The district court's statute of limitations decision was so clearly correct that it merited only a single paragraph in the court of appeals' opinion.

2. The statute of limitations ruling below was a straightforward application of this Court's recent decision in *Klehr v. A.O. Smith Corp.*, which explained how the antitrust statute of limitations applies to alleged continuing violations of the antitrust laws:

> "Antitrust law provides that, in the case of a 'continuing violation,' say a price fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, 'each overt act that is part of the violation and that injures the plaintiff,' *e.g.*, each sale to the plaintiff, 'starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.' But **the commission of a separate new overt act generally does not permit the plaintiff to recover for the injury caused by old overt acts outside the limitations period."**

Klehr, 521 U.S. 179, 189 (1997) (citations omitted, emphasis added); see also *Rotella v. Wood*, 120 S. Ct. 1075, 1082-84 (2000) (emphasizing the public policy of "rewarding the swift" that underlies the Clayton Act's "accrual rule that 'generally, a cause of action accrues and the statute begins to run when a defendant commits an act that injures a plaintiff's business'").

The USGA's motion *in limine* asked the district court to exclude evidence of precisely the damages that *Klehr* held are barred by the statute of limitations – damages "caused by old overt acts outside the limitations period." The district court did not err by granting that motion *in limine*.

3. Handicomp's argument for review on the statute of limitations issue is based on a misrepresentation of what the courts below did. Handicomp asserts that "the courts below refused to consider all pre-May 29, 1992 evidence *for all purposes*." Pet. 25. In fact, no such order was ever entered, and the district court clearly did consider pre-May 29, 1992 evidence.

The USGA's motion *in limine* sought narrow, specific relief: the USGA requested an order *in limine* barring Handicomp "from introducing evidence of *damages* which Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992." SA-388 (emphasis added). In granting that motion, the district court did **not** exclude all pre-1992 evidence:

> "It is . . . ORDERED that Defendant's *in Limine* Motion to Bar Evidence of Damages Which Handicomp, Inc. Allegedly Suffered as a Result of Acts That Occurred Before May 29, 1992 be and hereby is GRANTED."

Pet. App. 39a. The court of appeals emphasized that the district court excluded only evidence of *damages* caused by pre-May 29, 1992 conduct:

> "The USGA sought 'an order *in limine* barring plaintiff Handicomp . . . from introducing evidence of *damages* which Handicomp allegedly suffered as a result of acts that occurred before May 29, 1992 (four years before Handicomp filed this case).' Supp. App. at 388

> (emphasis added); *see* App. at 171. The district court granted the motion. App. at 2562-2563. Because Handicomp may not recover damages for any acts that took place before May 29, 1992, the district court ruling was correct."

Pet. App. 5a (emphasis added by the court of appeals).

The district court **expressly considered** pre-1992 evidence in ruling on the USGA's motion for summary judgment. For example, in assessing Handicomp's contentions regarding the USGA's alleged monopoly power, the district court expressly considered Handicomp's evidence and arguments regarding (1) the USGA's 1981 GHIN Feasibility Study, (2) the number of firms that offered handicap computation services in 1981; (3) the number of competitors that have entered the market "in the past 12 years," and (4) a 1991 USGA memorandum discussing the percentage of golf associations that used GHIN. Pet. App. 25a. Thus it is simply not true, as Handicomp asserts, Pet. 25, that the district court ruled that "all pre-May 29, 1992 evidence" is inadmissible "for all purposes."

4. Handicomp attempts to manufacture a conflict among the circuits by asserting that the court of appeals held "that the only relevant barrier to entry into the industry is the difficulty associated with creating the product or service." Pet. *i*, 16. However, the court of appeals did not so hold, and no issue relating to the definition of a legally cognizable barrier to entry was even briefed or argued in this case. Significantly, Handicomp has never previously cited the Tenth Circuit's *Reazin* decision on the issue of defining barriers to entry.[7]

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[7] Handicomp's brief in the court of appeals (at 45) cited *Reazin* (continued...)

The district court evaluated all of Handicomp's evidence, and concluded that Handicomp had failed to submit sufficient admissible evidence of barriers to entry to raise a triable issue. Handicomp's admissions that writing handicap computation software is easy and "getting easier," so that "somebody could sit down in a matter of three weeks, develop a product and put it on the market that would compete" (Stewart Healey dep., A-1161), clearly were an important factor in the district court's determination. Pet. App. 27a. Moreover, despite Handicomp's assertion to the contrary, the district court specifically held that "this Court need not rely solely upon this testimony in order to find that Plaintiff cannot establish that the barriers to entry . . . are significant." *Id.*

The district court went on to consider other evidence, including evidence that entry has occurred often, and that competitors (including Handicomp) have introduced new services and competed for new customers. *Id.* at 28a-29a. The district court also considered the certifications of Handicomp's experts regarding other alleged barriers to entry, but concluded that those certifications "clearly contradict both experts' earlier deposition testimony." *Id.* at 35a n.8.

Neither the district court nor the court of appeals excluded any evidence because of a narrow definition of barriers to entry. The lower courts simply held that Handicomp's evidence was insufficient to establish a triable issue with respect to the existence of *any* barriers to entry.

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[7] (...continued)
only for the limited proposition that in some cases market power may be inferred from a high market share. That point had nothing to do with the definition of a barrier to entry.

The Tenth Circuit's decision in *Reazin* is not inconsistent with the Third Circuit's unpublished opinion in this case. *Reazin* held that "substantial market power can persist only if there are significant and continuing barriers to entry." 899 F.2d at 968, quoting Areeda & Turner, *Antitrust Law* ¶ 505. The Third Circuit agrees. Pet. App. 7a-8a. The *Reazin* court listed examples of possible barriers to entry, including "high capital costs or regulatory or legal requirements such as patents or licenses." 899 F.2d at 968. The lower courts in this case never suggested that such market facts, if proven, would not constitute legally sufficient barriers to entry. The courts below simply held that Handicomp's evidence did not create a triable issue regarding the existence of *any* barrier to entry. That fact-based determination does not merit review by this Court.

5. Handicomp also challenges the court of appeals' holding that "there was insufficient evidence presented that USGA committed any anticompetitive or exclusionary acts" (Pet. App. 9a). However, Handicomp bases that challenge entirely on a vague assertion that the court of appeals should have applied "a heightened level of antitrust scrutiny." Pet. 13-14. Significantly, Handicomp never explains what the alleged "heightened" standard is, or how it should apply in this case. In any event, the cases upon which Handicomp relies — *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988), and *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982) — do not support the assertion that any such "heightened" standard exists.

Neither *Allied Tube* nor *Hydrolevel* even mentions any special antitrust standard for determining the legality of a defendant's conduct. Indeed, the legality of conduct was not at issue before this Court in either case. Instead, those cases involved discrete issues that are not presented in this case —

Noerr-Pennington immunity (*Allied Tube*) and the liability of principals for the acts of their agents (*Hydrolevel*).

Allied Tube and *Hydrolevel* do not support, even by analogy, Handicomp's assertion that a "heightened" standard applies in cases where "an antitrust defendant . . . is the rule-maker/standard setter in an industry in which it competes." Pet. 15. Neither case involved such a situation. Instead, in both of those cases the "rulemaker" was a trade association which did not compete in the relevant market, but which promulgated standards that affected competition among its members. *Allied Tube*, 486 U.S. at 495; *Hydrolevel*, 456 U.S. at 559. In each of those cases, members of a trade association conspired in violation of § 1 of the Sherman Act to cause the trade association to issue rules that prohibited the use of a competitor's product. 486 U.S. at 496-97; 456 U.S. at 562-63.

Nothing of the sort occurred in this § 2 monopolization case. The USGA is not an association of competitors, and it did not issue rules that prohibited the use of Handicomp's product. As the district court specifically determined, Handicomp's evidence did not show that the USGA "manipulated the rules of the game of golf" in a way that injured Handicomp, or impaired competition. Pet. App. 31a. That fact-bound assessment of the record, which the court of appeals affirmed, disposed of Handicomp's claim that the USGA somehow abused its rulemaking authority.

6. Finally, the decisions below were correct for a reason that the court of appeals did not reach: Handicomp's own damage theory, and the testimony of Handicomp's own expert witness on damages, demonstrated that Handicomp had not suffered antitrust injury. Handicomp's damage claim was based exclusively on the theory that Handicomp would have made more sales, and could have charged higher prices, "if GHIN

didn't exist." A-198-15. As the district court correctly held, Handicomp "is alleging that it lost profits because of GHIN's competition with it. This simply is not 'anti-trust injury' as the courts have defined it." Pet. App. 33a.

This conclusion was compelled by controlling decisions of this Court. For example, in *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 484 (1977), the Court held that damages may not be awarded under the antitrust laws "where the sole injury alleged is that competitors were continued in business." *Brunswick* holds that injuries caused by competition are not compensable under the antitrust laws. 429 U.S. at 488. In *Cargill, Inc.* v. *Monfort of Colorado, Inc.*, 479 U.S. 104, 114-117 (1986), the Court held that "[t]he logic of *Brunswick* compels the conclusion that the threat of loss of profits due to possible price competition . . . does not constitute a threat of antitrust injury." And in *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 337-38 (1990), the Court held that the plaintiff did not suffer antitrust injury when its competitor reduced prices, because "[a] firm complaining about the harm it suffers from nonpredatory price competition 'is really claiming that it [is] unable to raise prices.' This is not antitrust injury."

Handicomp's damage claim failed in the courts below for the same reason. As Judge Easterbrook has observed:

> "The claim that a practice reduces (particular) producers' incomes has nothing to do with the antitrust laws, which are designed to drive producers' prices down rather than up. Indeed, it does not even state an antitrust injury. . . . [T]he Sherman Act . . . is aimed at protecting consumers from high prices. Plaintiffs, who want to . . . charge higher prices, have pleaded themselves out of court on the antitrust claim."

SanJuan v. American Bd. of Psychiatry & Neurology, 40 F.3d 247, 251-52 (7th Cir. 1995) (citations omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 00-231

IN THE

Supreme Court of the United States

HANDICOMP, INC.,
a Michigan corporation,

Petitioner,

v.

UNITED STATES GOLF ASSOCIATION,
a Delaware corporation,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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14 pp

TABLE OF CONTENTS

	Page
Table of Cited Authorities	ii
Statement	1
1. Statute of Limitations.	1
2. Monopoly Power.	4
a. Barriers to Entry.	4
b. High Market Share.	6
c. High Market Concentration.	6
d. Consumer Demand.	6
3. Anticompetitive Conduct.	7
4. Antitrust Injury.	8
Conclusion	10

TABLE OF CITED AUTHORITIES

Page

Cases:

American Society of Mechanical Engineers v. Hydrolevel Corp., 472 U.S. 585 (1985) 1, 8, 9

American Tobacco Co. v. United States, 328 U.S. 781 (1946) 6

Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) 9

Continental Ore Company v. Union Carbide and Carbon Corporation, 370 U.S. 317 (1962) 1, 2, 3

Domed Stadium Hotel, Inc. v. Holiday Inns, Inc., 732 F.2d 480 (5th Cir. 1984) 6

Fineman v. Armstrong World Industries, Inc., 980 F.2d 171 (3rd Cir. 1992) 6

Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481 (1967) 2, 3

Klehr v. A.O. Smith Corp., 521 U.S. 179 (1997) .. 1, 3, 4

Reazin v. Blue Cross and Blue Shield, 899 F.2d 951 (10th Cir. 1990) 5

Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911) 2

Cited Authorities

	Page
Zenith Corp. v. Hazeltine Research, Inc., 395 U.S. 100 (1969)	9
Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321 (1971)	3, 4

STATEMENT

In its opposition brief, USGA does not address critical facts and issues raised in the petition. Additionally, many of the "facts" recited by USGA have been taken out of context.

Summary judgment was entered against Handicomp despite a considerable body of evidence showing that USGA has acquired a 72%+ monopoly share of the market for golf handicap computation services by abusing its rulemaking power and its role as the governing body of golf in the United States, resulting in higher prices and lower quality to consumers. The only avenue by which USGA can avoid having to answer for the consequences of its illegal actions is to claim that the acts it committed occurred outside the four year limitations period. This argument is demonstrably groundless because many of the illegal acts occurred within the four year limitations period and they continue to this day. USGA's actions, both before and during the limitations period, are part of an ongoing conspiracy between the USGA and its regional golf association surrogates, beginning in 1981, to monopolize the national market for golf handicap computation services. USGA prevailed in the courts below by convincing them to disregard relevant facts and controlling Supreme Court precedents, including *Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. 317 (1962) and *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 472 U.S. 585 (1985) and by misconstruing this Court's decision in *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997).

1. Statute of Limitations.

The threshold issue is whether the acts upon which the complaint is based occurred wholly outside the limitations period. They manifestly did not.

There is abundant evidence showing that USGA intended to illegally use its power as golf's governing body to monopolize the market for handicap computation services dating from the inception of GHIN. McKinsey Study, A-361-406; GHIN Feasibility Study, A-321; Easterly Letter, A-2079. This evidence is relevant to show USGA's illegal intent,

motive and purpose which continue to this day. The district court refused to consider this evidence because the acts *occurred* outside the limitations period. Pet. App. 19a-20a. This was reversible error. *Continental Ore Company v. Union Carbide and Carbon Corporation*, 370 U.S. at 709-10 and n.15 [exclusion of evidence predating the limitations period was error where the evidence was material to claim of conspiracy and monopolization]; *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 75-76 (1911) [evidence of defendant's acts in 1879-1882, *before passage of the Sherman Act* in 1890, was necessary to determine the intent or purpose of the founders of Standard Oil]; and *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 502 n.15 (1967) [defendant's conduct "inflicted continuing and accumulating harm" and although plaintiff could have sued in 1912, it was equally entitled to sue in 1955].

Even so, there is much evidence showing that USGA actually *committed* anticompetitive acts *within the limitations period*. For example: The evidence shows that USGA improperly used its power as golf's governing body to create the Metropolitan Amateur Golf Association [MAGA] in St. Louis precisely so that MAGA could become a GHIN customer. This had the effect of destroying Handicomp's business in the St. Louis area. A-2152-53; A-1957-58. This happened in 1993, well within the limitations period. USGA improperly leveraged its power as golf's governing body to foreclose all competition for the handicapping business of the Kentucky Golf Association ["KGA"], even though KGA officials *confirmed* that USGA's GHIN service was both inferior to and more expensive than competing services. A-2013-17; A-1998; A-2001; A-2006; A-2010. No GHIN competitor was given a meaningful opportunity to compete for this business. This happened in 1995, *well within the limitations period.*

USGA continues today to give its GHIN handicap service advance notice of handicap rules changes so that GHIN can schedule and even budget for the programming revisions that will be required. In some cases, USGA has put off changing

the USGA Handicap System rules, because the changes would be disruptive to GHIN's business. GHIN's competitors do not receive these advantages from the sport's governing body, instead they are repeatedly put at a competitive disadvantage as they are forced to disrupt their operations and incur significant unplanned costs in order to reprogram on short notice to accommodate USGA's rules changes. A-2132-34; A-458-59; A-1966-67; A-2107; A-456; A-1928-29; A-317-18; A-1928-29. The latest in a long line of rule changes occurred in the fall 1997, *well within the limitations period.*

These are but a few of the damaging acts committed by USGA *within the limitations period,* in furtherance of the plan hatched in the early 1980s to monopolize the market. After the district judge said he would not consider acts that occurred in the pre-limitations period, he then impermissibly compartmentalized (the district judge's own word (T.32:11-13)) the evidence of acts committed by USGA within the limitations period and concluded that, standing alone, they did not support Handicomp's monopoly claim. By compartmentalizing and examining each act in isolation, the district court erroneously concluded that Handicomp had not shown specific harm resulting from each and they were, therefore, to be disregarded. Pet. App. 29a-30a. This is *precisely* the type of evidentiary dissection that was held to be inappropriate in antitrust cases and condemned by the Supreme Court in *Continental Ore.*

USGA's and the district court's reliance on *Klehr v. A.O. Smith Corp.*, 521 U.S. 179 (1997) is misplaced. *Klehr* is not applicable to a case such as this one where the illegal conduct occurred within the limitations period. Furthermore, *Klehr* is inapposite to an antitrust case involving a long-term conspiracy to monopolize a market. The interpretation given *Klehr* by the district court (*Klehr* was a RICO case and not an antitrust continuing conspiracy case), if applied to antitrust cases involving continuing conspiracies, will result in the overturning of long-established Supreme Court precedent, including *Hanover Shoe, Inc. v. United Shoe Machinery Corp, supra* and *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321,

338 (1971). The rule unquestionably is that acts committed *within* the limitations period (the case here) start the statute running again. *Klehr v. A.O. Smith Corporation*, 521 U.S. at 189.

The pre-limitations period evidence is highly relevant and should not have been disregarded by the courts below. Once evidence of antitrust activity by USGA *within* the limitations period was presented, the statute of limitations defense could not be dispositive of the case on a summary judgment motion. The Supreme Court should grant the petition in order to correct the misapplication of *Klehr* by the district court.[1]

2. Monopoly Power.

a. Barriers to Entry.

The lower courts' finding that USGA lacks market power — and USGA's argument supporting the conclusion — is based on a superficial and fundamentally flawed analysis that failed to consider evidence showing that barriers to entry are high. The focus of the courts below was solely on whether it is difficult to create a software program that can calculate a golf handicap. In its brief, USGA focuses on a statement made by Handicomp's president in his deposition that it is not difficult to create such a program and, therefore, barriers to entry must, necessarily, be low. This ignores the fact that the ease or difficulty associated with writing a software program to calculate a golf handicap is only one of the elements needed to crack the golf association

1. USGA attempts to make much of the district court's refusal to allow Handicomp to amend the complaint to include a fraudulent concealment count. USGA argues that when Handicomp's motion to amend was denied, USGA automatically prevailed on its statute of limitations defense. This is, quite simply, wrong. A fraudulent concealment claim would have served only to open up the damages period to include acts committed prior to the limitations period. In other words, Handicomp's damages would have increased. The fraudulent concealment claim had nothing whatsoever to do with the damages caused Handicomp either as a result of USGA acts *committed* within the limitations period or as a result of harm caused by the long term conspiracy continuing into the limitations period.

handicap market. The courts below — and USGA in its opposition brief — disregarded the substantial evidence which shows that barriers to entry into the relevant market are virtually insurmountable.

Evidence of high entry barriers was presented to but ignored by the courts below. The Third Circuit's narrow inquiry into whether it is easy to write a handicap computation program is at odds with the thorough and sensible analysis employed by the Tenth Circuit in *Reazin v. Blue Cross and Blue Shield*, 899 F.2d 951 (10th Cir. 1990). Important indicators of entry barriers overlooked by the Third Circuit include the existence of legal license, control over an essential or superior resource and entrenched buyer preferences. *Id.* at 968. The record shows that these barriers exist in the relevant marketplace. They are referred to in Handicomp's Petition at pp. 4-5 and 19 and ignored by USGA in its brief.[2]

The strongest evidence of high entry barriers is the fact that *no new firms have entered this market since 1986* and competition has been reduced from approximately 40 to the four firms that survive today. A-2067, 2006, 1949. In addition to the direct evidence of high entry barriers, logic alone suggests that if entry barriers are low — as USGA claims and as the courts below found — there would have been at *least some new entrants* to the market in the last 14 years.[3]

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2. USGA says that Handicomp cited *Reazin* in the court of appeals only in support of its contention that market power may be inferred from high market share alone. This is not true. Handicomp's brief in the court of appeals says that, *in addition to market share*, "when other special market conditions are considered, such as concentration of market, high entry barriers and consumer demand, monopoly power must be presumed where a firm has a 70%+ market share." Br. p. 45. Handicomp has made this argument consistently throughout.

3. USGA says that market entry is easy because, on one occasion, the Southern California Golf Association (a non-GHIN association) actually accepted proposals from some firms who were not then in the market and never subsequently entered it. The fact that some firms may have tried to gain entry and were locked out is evidence of entry barriers, not the easy market access that USGA says exists.

b. *High Market Share.*

In addition to evidence of high entry barriers, the evidence shows that USGA has a 72%+ market share which should have led the courts below to find at least an inference of monopoly power sufficient to withstand summary judgment. *See Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171 (3rd Cir. 1992) ["existence of [market] power ordinarily may be inferred from the predominant share of the market."], *citing*, *American Tobacco Co. v. United States*, 328 U.S. 781 (1946) ["over two-thirds of the entire domestic field of cigarettes, and over 80% of the field of comparable cigarettes constituted a 'substantial monopoly'."]

c. *High Market Concentration.*

A highly concentrated market is one factor that militates in favor of a finding that a firm with a predominant market share has monopoly power. *See Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, 732 F.2d 480, 490 (5th Cir. 1984). The courts below did not acknowledge that market concentration is relevant, much less that this market is highly concentrated. Not only does USGA control the market, its 72%+ market share is *9 times greater* than the 8% share held by its next closest competitor. USGA's dramatically high market share in a highly concentrated market is strong evidence of monopoly power. *See e.g.*, *Fineman v. Armstrong World Industries, Inc.*, 980 F.2d at 202.

d. *Consumer Demand.*

High consumer demand is another element of market power that USGA refuses to address. *Domed Stadium Hotel, Inc. v. Holiday Inns, Inc.*, *supra*. Consumer demand for GHIN is very high, although artificially created. It derives from factors that are totally unrelated to quality and price. In fact, consumer demand for GHIN is high *in spite of its low quality and high price*. The record facts cited throughout the petition show that demand for GHIN derives from the prestige that regional associations acquire by being associated with the governing body of golf and by USGA allowing its GHIN customers to use USGA's trademarks, giving regional association officials highly coveted seats on USGA's many committees, fostering the false

notion that one must have a handicap from GHIN in order to have a valid USGA Handicap, falsely claiming that GHIN is the only handicap service that is always in compliance with USGA handicap rules and, most significantly, USGA's stunning policy of kicking back all GHIN profits to its GHIN customers.[4] This level of consumer demand is additional strong evidence of USGA's market power. *Id.*[5]

3. Anticompetitive Conduct.

USGA claims there is no evidence of anticompetitive conduct. The courts below agreed, but they inexplicably gave no consideration to the many actions committed by USGA that foreclosed competition. These acts include abusing its rule making power by manipulating the rules of golf to give GHIN competitive advantages and negate innovations by competitors and by intentionally using its power as golf's governing body to destroy firms who were viewed as potential GHIN competitors. These are but two of the anticompetitive activities engaged in by USGA that are designed to give GHIN unfair competitive advantages, facts which were ignored by the courts below and by USGA in its brief. Yet, the Supreme Court has specifically said that abuses by standard-setting organizations

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4. Although GHIN profits are kicked back to the associations, GHIN's price remains higher than competitor's and the cost to the end-user — the golfer-consumer at the club level — remains well above the prices a competitive market would otherwise yield.

5. USGA claims that its own customer surveys suggest that GHIN users are generally happy with GHIN and they consider it to be priced "about right." Opp. Br. 6 n.5. This is to be expected from customers who are beholden to USGA for their very existence as USGA-authorized golf associations, whose officials sit on prestigious USGA committees, including its Executive Committee, and who, as a consequence, regularly rebuff marketing proposals from GHIN's competitors. The GHIN associations have no way of knowing what the competition's attributes and prices are. When the Kentucky Golf Association actually thought seriously about making a change because GHIN was inferior and more expensive, the risk that KGA would be viewed as anti-USGA carried the day and KGA stayed with GHIN despite the additional $30,000 in annual costs this small association would incur.

like USGA constitute "anticompetitive activity." *American Society of Mechanical Engineers v. Hydrolevel Corp.*, 472 U.S. at 571.

USGA ignores these anticompetitive acts and instead quotes selectively from the deposition transcript of Patricia Healey and Lisa Postma, the wife and daughter, respectively, of Handicomp's founder, to show that these two individuals did not identify anti-competitive activities by USGA. But these two individuals were home office workers who had minimal involvement in the marketing of Handicomp and little occasion to know the details of USGA's actions. A-1026-4. USGA also quotes from the deposition transcript of one of Handicomp's experts to the same effect. This expert was not, however, retained to opine on USGA's anticompetitive conduct. A-208.

The flimsy basis for USGA's assertion that no anticompetitive conduct was committed does not nullify the substantial evidence in the record that supports the opposite conclusion. A-1945-69, A-1925-1. It is this evidence in support of Handicomp's claims that should have carried the day on USGA's summary judgment motion.

4. Antitrust Injury.

USGA misstates the basis for Handicomp's damage claims. It is the same erroneous reasoning that the district court adopted.

Handicomp's damages expert, Dr. Upton, concluded that Handicomp's injury resulted from the fact that GHIN's marketing was completely dependent upon and tied up with USGA's role as golf's governing body. They were inseparable. Handicomp's damages did not result, as USGA claims, merely from the fact that GHIN competes against it. In his report, Dr. Upton says that "[t]he GHIN system was marketed through a series of anticompetitive practices by USGA." A-466, 488. These are so pervasive and firmly tied to USGA's governing body role that *GHIN does not have to compete on the merits* like other handicap services. Dr. Upton concluded that GHIN would have failed without USGA's misuse of its rulemaking power, prestige and large financial subsidies. A-509-11. This case is not

governed by *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477 (1977) as USGA contends and as the district court erroneously held. In *Brunswick*, the plaintiffs would have suffered exactly the same injury even if the bowling alleys were run by an independent third party. Not so here. Without USGA's improper influence, GHIN would and should have failed.[6]

Finally, USGA says there is no requirement that a standard setter be held to a heightened level of antitrust scrutiny when it does business in the industry where it makes the rules. The cases governing the liability of standard setters suggest otherwise. The Supreme Court has said:

> [A] standard-setting organization . . . can be rife with opportunities for anticompetitive activity. Many of [the organization's] officials are associated with members of the industries regulated by [the organization's] codes.

and

> Thus, a rule which imposes liability on the standard-setting organization — which is best situated to prevent antitrust violations through the abuse of its reputation — is most faithful to the congressional intent that the private right of action deter antitrust violations.

American Soc. of Mechanical Engineers v. Hydrolevel Corp., 456 U.S. at 571 and 572-573. For the same reasons, USGA's GHIN business requires a heightened level of antitrust scrutiny.

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6. USGA claims that because its wrongful actions resulted in the artificial depression of Handicomp's prices by some 25%, Handicomp did not suffer antitrust injury. This is not legally supportable. USGA has persistently refused to address Handicomp's argument that, even if Handicomp's prices were 25% higher, they would still have been lower than GHIN's, thereby resulting in a higher quality service at less cost to the consumer. Pet. 23-24. As stated in the petition, the Supreme Court has held that a "defendants' wrongful acts and their tendency to injure plaintiffs' business" followed by a "*decline in prices*, profits and values, not shown to be attributable to other causes" evidences antitrust injury. *Zenith Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) [emphasis added].

CONCLUSION

This antitrust case was dismissed on a motion for summary judgment because the courts below disregarded relevant facts and ignored or misconstrued controlling Supreme Court precedent. Unless these serious errors are corrected by the Supreme Court, an existing national monopoly will be allowed to spread at the expense of both competition and consumers. This will assuredly result in the 100% takeover of the market that USGA's Director of GHIN projected GHIN will achieve by 2002. A-2136. The Petition for Certiorari should be granted to correct the errors of the courts below and to vindicate the rules of antitrust law enunciated by this Court.

Respectfully submitted,

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